Examining the Role of Informal Justice Systems in Child Rights Protection in Kenya: A Case Study of the Kipsigis

De rol van informele systemen van geschillenbeslechting in kinderrechtenbescherming in Kenia: een studie van de Kipsigis (met een samenvatting in het Nederlands)

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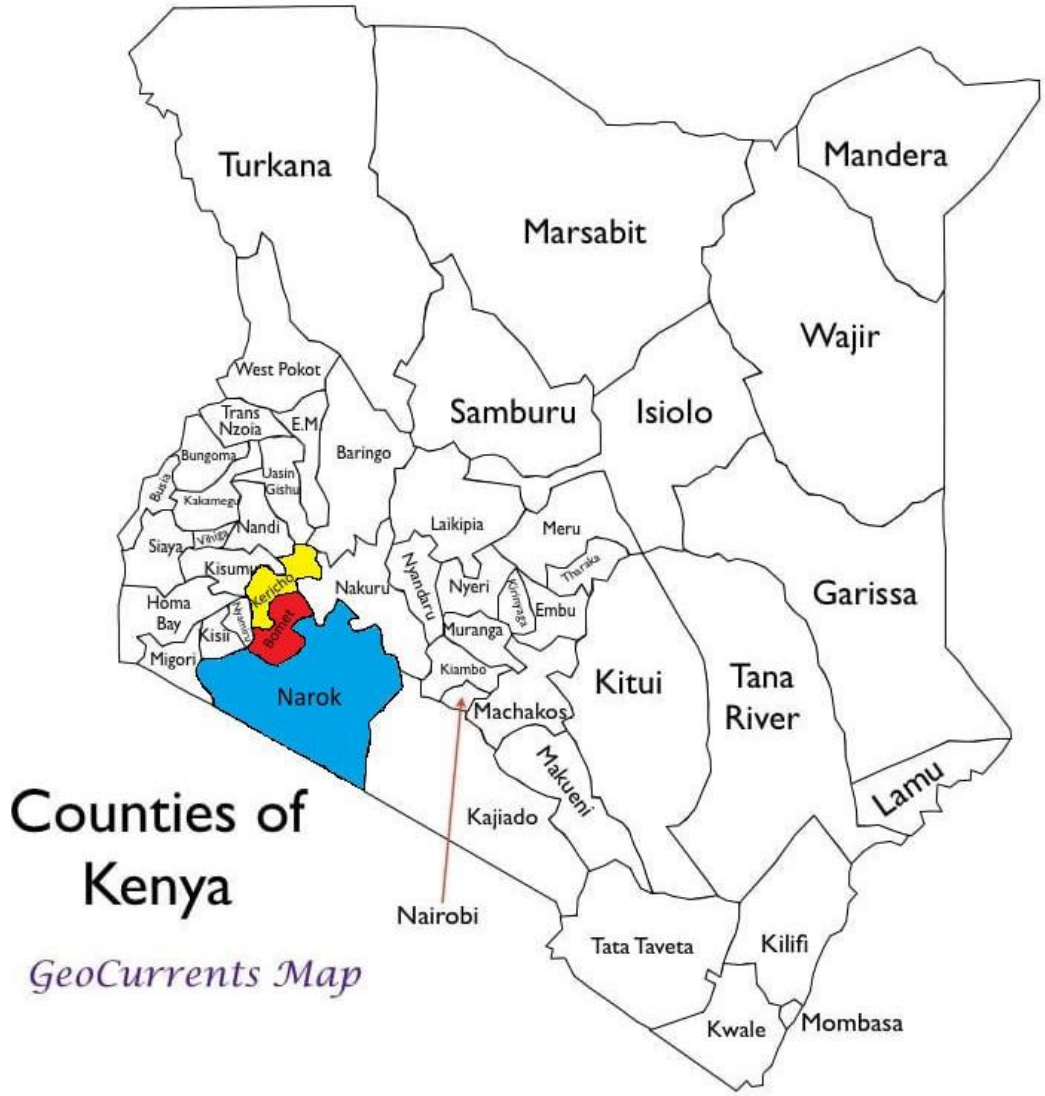
i) List of Abbreviations

AAC-Area Advisory Council
ACC-Assistant County Commissioner
ACRWC-African Charter on the Rights and Welfare of the Child
ART-Alternative Right of Passage
AU-African Union
CC-County Commissioner
CCGD-Collaborative Centre for Gender and Development
CEDAW-Convention on Elimination of all Forms of Discrimination against Women
CREAW-Centre for Rights Education and Awareness
DCC-Deputy County Commissioner
ICC-International Criminal Court
FEMNET- African Women's Development and Communication Network
FGM-Female Genital Mutilation
FIDA-Kenya: Federation of Women Lawyers
FJS-Formal Justice Systems
GVRC-Gender Violence Recovery Centre
GBVGender-Based Violence
IJS-Informal Justice System
KELIN-Kenya Legal and Ethical Issues Network
KNCHR-Kenya National Commission on Human Rights
KNBS –Kenya National Bureau of Statistics
Ksh –Kenya Shillings
LGBTI-Lesbian, Gay, Bisexual, Transgender, and Intersex
LRF-Legal Resource Foundation
NGEC-National Gender and Equality Commission
NGO-Non Governmental Organization
OAU-Organization of African Unity
OVC-Orphans and Vulnerable Children
UCRC-UN Convention on the Rights of the Child
UN –United Nations
UNHCR-UN High Commission for Refugees
UNICEF- United Nations International Children's Emergency Fund
VCO-Volunteer Children Office

ii) Map of Kenya showing the study areas (Kericho, Bomet and Narok)



CHAPTER 1

Introduction

1.1 Introduction

This study took place within the context of rural Kenya. Geographically, Kenya is located on the Eastern parts of Africa and borders Uganda to the west, Somalia to the East, Tanzania and Indian Ocean to the South and Ethiopia and Southern Sudan to the North. Specifically, the data collection was done among members of the Kipsigis community in Kenya. The research sought to explore the role of informal justice systems in child protection in Kenya by specifically focusing on the Kipsigis. To this end, the study sought to explore the operational and normative framework of informal justice systems among the Kipsigis, as well as to examine how the systems utilize customary law to protect and (or) violate children's well-being. Within this context, the researcher sought to understand how the different customary dynamics and laws play out within the context of the best interest of the child and how various sectors and players within the social structure of the Kipsigis social relationships interact to protect and or violate children rights. To achieve this, the researcher conducted ethnographic studies, field interviews and focus group discussions. The research findings are discussed below.

Chapter one of this thesis lays the background, sets out the research objectives and questions and examines methodological, theoretical and structural issues concerning the thesis. Chapter two of the thesis maps out the key theoretical debates within legal pluralism, customary law and informal justice systems and traces the historical development of customary law in Kenya and across the region. This chapter also defines the key concepts used in the study. Chapter three examines the international and domestic child rights protection framework and highlights the (un)responsiveness and tensions that exist between rights (that draw support from the state) and virtues (that draw support from rural communities) with regards to child well-being. This chapter also highlights some of the key weaknesses of 'rights talk' within child rights scholarship.

Chapter four, a findings chapter, explores the key informal justice platforms among the Kipsigis and identifies the prevalence of forum shopping within and across these dispute resolution platforms. The chapter, therefore, observes that although informal justice processes play a central role in child rights realization, they are characterised by contestation over the conceptions of justice and (customary) law, a factor which contributes to forum shopping. It is also noted that children matters among the Kipsigis are so entrenched with those of their parents that isolating the issues of children from those of their parents is both impossible and undesirable.

Building on the findings of chapter four, chapter five explores the processes through which the Kipsigis community develop conceptions of child well-being and the interaction between this conception and state law. Specifically, the chapter observes the dominance of ordinary virtues and the language of care over that of rights and claims among the Kipsigis. Accordingly, this chapter responds to the question of what customary frameworks exist for child protection among the Kipsigis. However, as revealed in the chapter, some languages of well-being, such

as corporal punishment, are essentially inconsistent with the doctrine of care which community members rely on to justify them.

Chapter six builds from the Kipsigis location of child well-being within the context of care. It examines the question of the best interest of the child and concludes by noting the tensions between formal and informal conceptions of the concept, especially in view of the pluralism within Kipsigis society in which children interact with both customary agencies like informal justice systems, quasi-state agents like the Volunteer Children Officers (VCOs) and the chief, formal agents like the children officers and socialization institutions like the school. Accordingly, the chapter notes that the best interest of the child at the community level is seen in terms of the child's integration in the family, adherence to customary law by both the parent and the child and a consideration of what would be in the long term interest of the child.

Chapter seven, anchored on the conception of best interest, uses intersectionality to explore the different ways through which different customary factors affect boys and girls differently. It observes that gender interacts with age, culture and economic realities to produce outcomes that are more severe for the girls compared to the boys. It also noted that a different set of intersecting factors affects the boys. From this observation, the failure of the existing child protection approaches can be attributed to their failure to embrace intersectionality and appreciate the differences in child abuse between boys and girls.

Chapter eight takes this discussion further by exploring how child rights talk at the international and national level filters to the school through school textbooks and how eventually this is transmitted to the home by the children as a means of rights claim. However, as observed in chapter five both informal justice systems and families are resistant to any child rights talk. Rights as a language of claims although present among the Kipsigis through the doctrine of *imandanyun* is not conferred upon children. Accordingly, communities locate children's well-being within the language of care and virtues and require that children claim their interest on this basis. This contestation results in tensions which are often resolved by informal justice systems through the enforcement of child responsibility, care ethics and obligations to the child. Such an approach is however rejected by the formal child protection agencies who insist on the language of rights which they see as instrumental in protecting the 'good and innocent children' from the 'unjust and evil parents and communities.'

Chapter nine explores strategies that are being employed to resolve the tensions between the state, with its attempt to influence families through the language of rights and customary structures with their insistence that children are the 'private properties' of the families and clans. Accordingly, the chapter examines how NGOs are using cross-cultural dialogue as a means of reconciling the contestations and enhancing child well-being. To this end, the NGOs consider cross-cultural dialogue to be a platform of meaningful engagement and moral transformation. At the same time, the NGOs appear to be a part of the interest groups that advance the rights agenda thereby aligning them either directly or indirectly with the state in the moral contest between customary law and state law.

Chapter ten of this study summarises the key observations in view of the research objectives and questions and provides general reflections. It concludes that since the construction of the best interest of the child under customary law is contextual, age and gender-specific, there is a

need for policymakers to tap directly into local conceptions of best interest in a bid to protect the children's well-being. It also highlights areas for further research.

This thesis is located at the nexus of human rights, legal pluralism and socio-legal studies. The following section explores the contextual background of the thesis and highlights the gaps in knowledge that the study findings seek to fill.

1.2 Background to the study

Over the last 30 years, the international community has been at the forefront in pushing African states to put in place mechanisms for the realization of children rights, in line with UN Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). At the same time, resources have been directed at funding interventions and initiatives aimed at fulfilling the spirit and letter of the two conventions. These advocacy movements have focused on legal reforms and the enactment of statutes to domesticate the UNCRC and child-specific programmes aimed at alleviating child poverty.[1] This movement has had mixed results in Kenya. On one hand, it has led to the development of child rights instruments such as the Children's Act, 2001 the Prohibition of Female Genital Mutilation Act, 2011 and the Sexual Offences Act, 2006 as well as the establishment of children's courts across the country to determine cases involving children. At the sub-national level, Children's Officers and Children's Coordinators have been employed to oversee the implementation of the relevant child protection statutes and policies. On the other hand, the movement has alienated many constituencies, due to its focus on the top-down application of rights. Accordingly, there has been little focus on the community structures of child protection which have been largely considered to be inconsistent with children rights. This has resulted into child rights talk at the national level without corresponding improvement in child welfare at the grassroots level, with several reports indicating that the situation of children has largely remained constant in Kenya despite the heavy investment in legal reforms and implementation by donors and government.[2]

Kenya is characterized by legal pluralism in which citizens are subject to multiple legal systems at the same time. On one hand, citizens are part and parcel of the (hegemonic) state legal system complete with a sense of obligation to the various forms of state law. Within this context, good citizenship is determined on the basis of one's obedience to state law which is presumed to be determinate and certain with an absolute level of homogenous and equal application across the state.[3] Accordingly the state, through its agencies expects parents and communities to treat children on the basis of the Children's Act, UNCRC, ACRWC, and all relevant child legislation. On the other hand, citizens as part of rural communities, are subject to customary

[1] Brian Gran, Comparing Children's Rights: Introducing the Children's Rights Index' (2010) 18 International Journal of Children's Rights 1, 3-5

[2] See UNICEF and Government of Kenya, *Situation Analysis of Children and Adolescents in Kenya* (UNICEF 2014) accessed from *https://www.unicef.org/kenya/SITAN_2014_Web.pdf* on 7 February 2019 cf UNICEF and KNBS, *Child Poverty in Kenya: A multidimensional Approach* (UNICEF 2017) accessed from https://www.unicef.org/esaro/2017-UNICEF-Kenya-Child-Poverty.pdf on 7 February 2019

[3] For a discussion on legal certainty, see Adriaan Bedner and Barbara Ooomen, 'The Relevance of Real Legal Certainty- Introduction' in Adriaan Bedner and Barbara Ooomen (eds) *Real Legal Certainty and its Relevance : Essays in Honour of Jan Michiel Otto* (Leiden University Press 2018) 9-11

and sometimes religious law which although not enforced through coercive state apparatus like state law, is subject to intra-communal sanctions through which members force each other to comply. Children and their parents as part of the wider society often find themselves having to navigate continuously between these two systems of law in pursuit of justice and well-being. Accordingly, informal justice systems, which are the primary mechanisms through which communities resolve disputes and enforce customary law have emerged as a critical player in the promotion of interpersonal, inter-communal harmony and access to justice.

However as will be highlighted in this thesis, these informal justice structures do not rely on the language of international or legal rights. Rather they generate customary rights and sometimes rely on the language of care and virtue to realize well-being at the community level. At the same time, their focus on customs sometimes results in decisions which are considered by the international and domestic human rights regime to be in violation of children and sometimes women's rights.[4] Although they are hailed by NGOs such as International Development Law Organization (IDLO) and Danish Institute of Human Rights as crucial in access to justice, their location within tradition and culture has made them the subject of criticism within children rights and by extension women rights movements.[5] Accordingly, state and international human rights agencies have considered them as part of an outdated tradition that is inconsistent with the children rights doctrine.

Informal justice systems are community-driven justice systems that mostly embrace restorative justice in conflict resolution.[6] Due to the ethnic diversity in Kenya, there are as many informal justice platforms are there are communities and clans in Kenya. Each system is anchored upon the traditions and customs of the community concerned and resolves disputes on the basis of customary law.[7] Their roles in the resolution of land conflicts and cattle rustling have been extensively researched with scholars pointing out that quick justice, low cost, accessibility, flexibility and relationship-oriented approach to justice have attracted many community members to these institutions.[8] At the same time, studies have indicated that despite their weaknesses such as gender discrimination and patriarchy, many abused women still opt for informal justice systems to address cases of gender-based violence, even when courts and other formal institutions are physically accessible.[9] It is within this context that scholars and

[4] Wilfried Schärf, Chikosa Banda, Ricky Röntsch, Desmond Kaunda, and Rosemary Shapiro, 'Access to Justice for the Poor of Malawi? An appraisal of Access to Justice provided to the Poor of Malawi by the Lower Subordinate Courts and the Customary Justice Forum' 39 accessed from http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/AccesstoJusticeforthePoorinMalawi.pdf on 11 May 2017

[5] Ibid cf generally Erica Harper (ed) *Working with Customary Justice Systems: Post-Conflict and Fragile States* (IDLO 2011)

[6] I'm alert to the fact that in some instances, informal justice systems make judgements that are adversarial in orientation.

[7] Janine Ubink and Benjamin Van Rooij ,'Towards Customary Legal Empowerment : an introduction' in Ubink Janine and Thomas McInerney (eds) *Customary Justice: Perspectives on Legal Empowerment* (IDLO 2011) 9

[8] Nobirabo M, 'Local Communities' Access to Justice and the State in Kenya: Impunity, Legal Pluralism and the Resolution of Conflicts (2012) Swiss Network for International Studies working Paper No 4 <http://www.snis.ch/system/files/239_final_wp_5_working_paper_1.pdf >accessed on 01 August 2018

[9] See FIDA Kenya, '*Informal Justice Systems in Kenya: A Study of Communities in Coast Province* (2013) 10 accessed from http://fidakenya.org/wpcontent/uploads/2013/08/Traditional-Justicefinal.pdf accessed on 19/8/2018, cf UNDP 'Informal Justice Systems: Charting a Course for Human Rights-based Engagement' (2009) 8

development actors are increasingly focusing their attention to these institutions. In Kenya, the role of informal justice systems (IJS) and customary law in dispute resolution has been recognized and anchored in the Constitution and other relevant statutes which encourage the state to promote their use in dispute resolution.

Although the above dynamics have generated knowledge on the workings of IJS, there has been only limited focus on the way IJS is used to respond to cases of child abuse and enhance child protection with most data coming up as anecdotes or digressions in research projects on women's interaction with the informal justice systems.[10] It is on this basis that this study sought to examine how members of the Kipsigis community utilize these forums to (re)claim child well-being (or child rights) and how children use the same forums to claim their interests.

1.3 Statement of the problem

Over the years, child rights has grown into the counter-hegemonic narrative for the defenders of the 'oppressed' children, with child protection agencies focusing on the implementation and enforcement of legal rights guaranteed in treaties and domestic legislation. The assumption has been that the enforcement of these rights will enhance the emancipation of children. However, the situation of children has not changed much over the years, resulting into calls for a rethinking of this dominant approach and (re)consideration of how alternative mechanisms are used to protect children in different contexts. It is on this basis that this thesis explores the ways in which the Kipsigis, as a grassroots community, creates and responds to the violation of child well-being through informal justice systems. Using the Kipsigis informal justice systems as an entry point, the thesis explores how child well-being, that forms the basis of children's rights instruments, is enforced (or violated) through community structures. Specifically, the study assesses the contribution of informal justice systems to child well-being and assesses the extent to which such systems protect and (or violate) a child's best interest.

1.4 Justification of the study

This research has both academic and practical value. First, the study seeks to add significantly to knowledge on how the human rights protection agencies can engage with living customary law and informal justice systems to develop policies and programs that are responsive to grassroots socio-cultural realities. Secondly, the research contributes to the development of scholarship on legal pluralism and the living law and provides knowledge on how informal justice systems are used to address children matters at the community level. Thirdly, it is a resource for practical recommendations on how stakeholders in child protection utilize community conceptions of child rights (customary child rights) and ordinary virtues to promote the well-being of children. The study also highlights the different ways in which communities generate and sustain forms of well-being through customary law and the non-rights based language of virtue and care.

<http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Informal-Justice-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement.pdf> accessed on 25 May 2018

[10] Ibid cf Gisselle Corradi, 'A Review of Literature on Children's Rights and Legal Pluralism' (2015) 47 Journal of Legal Pluralism and Unofficial Law 226

1.5 Theoretical framework

1.5.1 Legal pluralism and living law

This thesis is located at the intersecting boundary of the living law, interest theory of rights, legal pluralism and care ethics. The four theoretical perspectives overlap to locate a rich academic and theoretical background for the research. The findings discussed in this thesis validate these theories and demonstrate the extent to which grassroots communities among the Kipsigis generate their own set of entitlements for children through a juris-generation of customary law and ordinary virtues like care ethics. Within this context, the customary law that is (re) created by the Kipsigis through their history and social relationships becomes one of the main forces of normative ordering that operate alongside (and sometimes in conflict with) state law, therefore, creating a scenario of legal pluralism. As noted by Eugen Ehrlich, customary law, as a form of living law, regulates life and is both a rule of conduct and a norm for decision. Thus;

> In customary law, that which has arisen in the legal consciousness of the people is directly converted into ethical custom: the people are not merely conscious of their law but they live their law, they act and conduct themselves according to it and this living according to customary law is not merely a form of manifestation but also a means of cognition of customary law.[11]

All societies create and recreate their own laws. Although their ways of life may be subject to state law, their daily activities are subject to a great number of compulsive forces such as customs, beliefs and social pressures which continuously dictate their understanding of social phenomena.[12] They, therefore, find themselves within the pluralistic triangle of international law on one side, national law on another side and living law on the other. Barbara Oomen has noted that indigenous customs and international human rights law interact to shape and reform each other.[13] According to her, local customs are influenced by international laws which are in turn heavily developed on the basis of local customs. To this end, international law, customs, and domestic state laws all interact in a context of legal pluralism where they borrow from (and influence) each other.[14]

It is against this background that the study explores the extent to which informal justice systems, as producers of customary law, utilize it to resolve children's matters. It must be pointed out that the children, parents and community members are both the subjects and objects of the living customary law and thus play an active part in creating and enforcing it. Accordingly, this study acknowledges that customary law is not fixed but is continuously being shaped by domestic and international realities and actors. The socio-legal space is therefore not a homogenous sphere dominated by one set of law over the other but by a protracted tension and contest between different forms of normative (dis)ordering with each one trying to claim

[11] Eugene Ehrlich, *Fundamental Principles of the Sociology of Law* (Transaction Publishers 2008) 449
[12] Sally Falk Moore, 'Law and Social Change: The Semi-autonomous Social Fields as an Appropriate Subject of Study' (1973) 7 (4) Law & Society Review 719
[13] Barbara Oomen, 'The Application of Socio-legal Theories of Legal pluralism to Understanding the Implementation and Integration of Human Rights Law' (2014) 4 European Journal of Human Rights 471, 475
[14] Ibid cf John Griffith, 'What is Legal Pluralism?' (1986) 32 (24) Journal of Legal Pluralism and Unofficial Law 1

its identity and non-interference from the other and with members of society retreating back to the one that guarantees the best legal outcome in any given scenario.[15]

In some instances, a mix of both living and state law would be perceived to generate the best outcome.[16] This especially occurs in the context of what Michael Lipsky calls 'street-level bureaucracy'.[17] Lipsky, in his seminal piece, has demonstrated how grassroots level government officials have to deviate from the law and policy due to the inconsistency between their job descriptions and the prevailing socio-economic and cultural realities of the communities and social spaces in which they operate.[18] Within this context, street-level bureaucrats among grassroots communities such as the Kipsigis resort to using living law (customary law) to fulfill the spirit of state law that creates and operationalizes their offices because strict compliance with the state law either produces absurd outcomes or compromises the realization of its very object. The fact that the law that creates the offices of the street-level bureaucrat does not (and cannot) envision every single scenario concerning children often leaves gaps that have to be filled by reliance on customary law. The concept of street-level bureaucracy is therefore considered to strengthen the understanding of legal pluralism in this thesis by highlighting the inadequacy of formal law in meeting the needs of grassroots communities and the attempts by state actors to appropriate customary law and use it to meet the ends of state law without appearing to deviate from their core obligation- the implementation of state law.

Since customary law operates on the basis of care rather than rights and law, the study was contextualized within the context of care ethics as explained below.

1.5.2 Care ethics

Largely associated with Annette Baier, Nel Nodding, Ann Stewart, Virginia Held and Joan Tronto among others, the ethics of care proceeds from the assumption that care is necessary to maintain, contain, and repair the world so as to make it a more habitable place for all its members.[19] It is anchored on interdependency, affection, empathy, responsibility mutual trust, a genuine desire to alleviate the suffering of others and protection of the vulnerable.[20] This requires the carer to acknowledge the responsibilities that come with caring which must be understood in the context of a mutual relationship with the care receiver.[21]

As an analytical framework, care ethics has the same orientation as customary law. This is because both care ethics and customary law focus on relational thinking and emphasises responsibility towards each other as the basic foundation of personhood. Within this context, Joan Tronto has specifically noted that caring involves, a proclivity to become aware of need,

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[15] Paul Berman, 'Dialectical Regulation, Territoriality, and Pluralism' (2006) 38 Connecticut Law Review 929
[16] Ibid
[17] For details see Michael Lipsky, *Street Level Bureaucracy: Dilemmas of the Individual in Public services* (Russel Sage Foundation 1980)
[18] Ibid
[19] Tronto, Joan *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1994)
[20] Julie White and Joan Tronto, 'Political Practices of Care: Needs and Right' (2004) 17 (4) Ratio Juris 425, 430
[21] Jonathan Herring, 'Compassion, Ethics of Care and Legal Rights' (2017) 13 (2) International Journal of Law in Context 158, 159

a willingness to respond and take care of need, the skill of providing good and successful care and the consideration of the position of others as they see it and recognition of the potential for abuse in care.[22] She divides care into caring for, which denotes the actual giving of physical care-such as caring for children, and caring about which denotes concern or empathy for someone without any physical support. This includes caring about the suffering of other people who are physically away from us.[23]

Care ethicists have long hailed the positive role that care ethics (can) play in guaranteeing child well-being. Feder Kittay observes that:

> The source of a mother's moral obligation to her infant is not the rights of the dependent person as a person, but rather the relationship that exists between the one in need and the one who is situated to meet the need. The defining characteristic of this largely socially-constructed relationship is that it is not usually chosen but already given in the ties of family…[24]

Although scholars like Kittay have identified the significant role that the language of care can play in the guarantee of child well-being, their studies are located within the 'Western' cultural context and are thus of limited application to the African cultural setting where culture plays a central role in the construction (and reconstruction) of care and virtues. The implication of culturally-based care ethics, on the well-being of children and the interaction between this language and the language of rights at the grassroots level largely remains under-explored.[25] This thesis, therefore, seeks to fill this gap by exploring how community and customary based moral virtues promote or inhibit the realization of child well-being.[26]

Care ethics within the context of child well-being, therefore, rests on an assumption that correlates with the interest theory of (children) rights which locate the child's well-being within the protection of its interests as discussed below.

1.5.3 Interest theory of rights

In a bid to unlock the conception of child well-being at the community level and investigate the overlap between the conception of the best interest principle between state agents, NGOs, and informal justice systems, this thesis is based upon an interest theory of rights. This is because an interest theory of rights approach recognizes the local conceptions of child's best interest and therefore establishes a convergence in the understanding of well-being between informal and formal justice systems, thereby, helping explain the dual usage of customary and state law

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[22] Tronto Joan, ' Care as a Basis for Radical Political Judgments'(1995) 10 (2) Hypatia 141, 142
[23] Ibid
[24] Feder Kittay cited in Tong, Rosemarie and Williams, Nancy, "Feminist Ethics", *The Stanford Encyclopedia of Philosophy* (Summer 2018 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/sum2018/entries/feminism-ethics/>.
[25] Ann Stewart has done an analysis of the nexus (or lack of) between care and justice but her focus is on the interaction between the two concepts within the context of international relations. For details see Ann Stewart, *Gender Law and Justice in the Global Market*, (Cambridge University Press 2011) 49
[26] I'm alert to Tronto's philosophical concerns on whether care is a practice, a kind of judgement, a value system, a branch of moral philosophy or a moral-self-constituting discourse. However this study will consider care as an ordinary moral virtue that can be used to promote human well-being cf Joan Tronto, 'Care Ethics: Moving Forward' (1999) 14 1 Hypatia 112, 117

in child protection by street-level bureaucrats like VCOs and children officers as well as by chiefs, elders and families at the community level.

Human rights theory has been characterized by two conflicting theories: the interest and will theories. The will theory, associated with scholars like Hart, Mill and Dworkin proceeds from the assumption that the individual is a (small) sovereign who is in charge of his destiny and should be left free to pursue it, to the extent that he does not interfere with other people.[27] As noted by Glendon, a focus on autonomy and liberty as propagated by the will theorists, at the expense of responsibility and obligations, has promoted 'human rights talk' that is increasingly becoming the primary language of claims. Glendon thus considers rights talk to be the systematic weaving of rights into the daily discourses of social interaction, a situation that antagonises relationships. Dismissing rights talk, she posits that rights corrode the fabric of beliefs, attitudes and habits upon which life, liberty, property and all other individual and social goods ultimately depend.[28]

The interest theory, on the other hand, is associated with scholars like Joseph Raz and John Finis who argue that the basic foundation of rights is to guarantee and protect human interests.[29] Accordingly, rights become instruments through which human well-being can be realized. John Finnis specifically argues that human rights are justifiable on the grounds of their instrumental value for securing the necessary conditions of human well-being. These conditions for well-being include:

> Life and its capacity for development; the acquisition of knowledge, as an end in itself; play, as the capacity for recreation; aesthetic expression; sociability and friendship; practical reasonableness, the capacity for intelligent and reasonable thought processes; and finally, religion, or the capacity for spiritual experience.[30]

It is on the above basis that scholars like Waldron have argued that the interest theory provides a subtle foundation for the analysis of child rights. Their argument is that because children are generally dependent on their parents, a rights framework that elevates their autonomy above their care needs, such as the will theory, is unreasonable and undesirable. Secondly, the extent to which children realize rights depends on the granting of the same by parents so that a meaningful rights theory must recognize this reality and position the child's well-being in terms of interests and not autonomy. Secondly, since a child is a developing being, the provision of those welfare needs that would facilitate this development is crucial for holistic well-being and development. This thesis, therefore, utilizes this theory to locate the child's interests and explore how these are created under customary structures and protected through informal justice systems.

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[27] Wenar, Leif, "Rights", *The Stanford Encyclopaedia of Philosophy* (Fall 2015 Edition) Edward N. Zalta (ed.), URL = https://plato.stanford.edu/archives/fall2015/entries/rights/ cf Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977)

[28] Mary Glendon, *Rights Talk: The Impoverishment of Political Discourse* (The Free Press 1991) 15, 14, 19

[29] Ibid

[30] John Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980)

1.5.4 Summary of the theoretical perspective

The study of plural legal systems is largely informed (and influenced) by the theory of living law.[31] This is because whereas legal pluralism pre-supposes the existence of several legal systems within the same social field, the theory of living law anchors at least one of these systems-customary laws, within the socio-cultural lives of the people. This nexus between the living law and legal pluralism provides an appropriate framework for analysing the extent to which informal justice systems among the Kipsigis rely on customary law to resolve children's matters at the community level.

The interest theory provides a mechanism for identifying child well-being and interest as the foundation of rights. The theory offers a foundation for the assertion that rights talk may be good in identifying children's moral claims but may not be a useful tool in realizing them at the community level where non-rights based languages such as ordinary virtues and care dominate normal discourses. The theory provides a framework for locating child's interest within the language of well-being and ordinary virtues such as care ethics. At the same time, the focus on interests and not autonomy or legal rights as the foundation of well-being within this theoretical context sheds light into the customary construction of children rights and well-being. Additionally, the location of the child's interest within the language of care ethics resonates with the customary foundation of well-being among the Kipsigis and various communities in rural Africa. The ethic of care and ordinary virtues encapsulates the Kipsigis worldview on child protection and well -being, providing an intellectual foundation for the social practices of the Kipsigis with regard to children's protection. Within this context, cross-cultural conversations and interactions between informal justice systems, with their focus on ordinary virtues/care and state agents, with their focus on rights and state law may be inevitable.

1.6 Research objectives and questions

The main objective of this thesis is to examine the role of informal justice systems in child rights protection in Kenya.

1.6.1 Specific objectives

The specific objectives are:

i. To explore the operational and normative framework of informal justice systems among the Kipsigis
ii. To examine the ways in which informal justice systems and Kipsigis customary law respond to and (or) perpetuate the violation of child rights
iii. To examine the (un)suitability of 'rights talk' and (inter)national child rights instruments in guaranteeing the well-being of children among the Kipsigis.
iv. To explore the scope and nature of care ethics, ordinary virtues and cross-cultural dialogue in the protection of child well-being.

[31] David Nelken , 'Eugen Ehrlich, Living Law and Plural Legalities' (2008) 9 (2) Theoretical Inquiries in Law 443, 451-453

1.6.2 Research questions

Using the Kipsigis as an entry point, this thesis seeks to answer the broader question of what role informal justice systems play in child rights protection in Kenya. To respond to this question, the thesis is guided by specific research questions, each addressing one subset of the broader question as indicated below:

i. What is the operational and normative framework of informal justice systems among the Kipsigis?
ii. How do informal justice systems and Kipsigis customary law respond to and (or) perpetuate the violation of child rights?
iii. Does rights talk and the (inter)national child rights instruments adequately protect children among the Kipsigis?
iv. What is the role of customary ordinary virtues, care ethics and cross-cultural dialogue in the promotion of child well-being among the Kipsigis?

1.7 Scope, study population and limitations

1.7.1 Geographical and cultural description of the study area

The study is located within the broader context of rural Kenya. Kenya lies in East Africa and has about 75% rural population. As a former British colony, the country has a plural legal system comprising of common law, civil law, religious law, international law and customary law. Up until 2010, Kenya had a Constitution which dated back to the independence period in 1963.

The country is geographically divided into 47 counties each with a county government and a county assembly that is responsible for legislation at the county level. There is also a National Assembly and a Senate which make state laws. Due to the sensitivity and fluidity of ethnicity[32], there is no official document indicating the number of ethnic groups in Kenya. Accordingly, the number of ethnic groups ranges from 105 indicated in the Kenya Population Census, 2009[33] to 47 indicated in the Kenya Population Census, 1999[34] to 42 in the world Population Review,[35] to 70 given by the African Study Centre at the University of Pennsylvania.[36] The country records a poverty level of 45.2% with rural areas recording higher levels of poverty than the urban areas.[37]

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[32] For such a view see Morgan William, 'The Ethnic Geography of Kenya on the Eve of Independence' (2000) 54 Erdkunde 76, 78 cf Gabrielle Lynch, Kenya has more than 42 tribes, so why is this still the magic number? (Daily Nation, September 12th 2014) accessed from https://mobile.nation.co.ke/blogs/Kenya-has-more-than-42-tribes/-/1949942/2450876/-/format/xhtml/-/hiqppe/-/index.html

[33] Kenya National Bureau of Statistics, https://www.knbs.or.ke/ethnic-affiliation/

[34] See Government of Kenya, *Kenya Population Census- 1999* accessed from https://www.knbs.or.ke/download/statistical-abstract-1999/ 23

[35] See KNBS http://worldpopulationreview.com/countries/kenya-population/

[36] http://www.africa.upenn.edu/NEH/kethnic.htm

[37] KNBS and SID, *Exploring Kenya's Inequality: Pulling Apart or Pulling Together* (SID 2013) 35 http://inequalities.sidint.net/kenya/wpcontent/uploads/sites/3/2013/10/SID%20Abridged%20Small%20Version%20Final%20Download%20Report.pdf

1.7.2 The Kipsigis

The research was conducted among members of the Kipsigis community in Bomet, Kericho and Narok Counties. The Kipsigis, a Nilotic community, is part of the broader Kalenjin community that inhabits the Rift Valley Highlands in Kenya. Specifically, the Kipsigis inhabit Kericho, Nakuru, Bomet and Narok counties. The Kalenjins are said to have originated from Ethiopian-Sudan Highlands and moved southwards to Kenya. The Kalenjin community is composed of several sub-ethnic groups namely the Kipsigis, Keiyo, Sebei, Nandi, Marakwet, Sabaot, Tugen and Terik. A diagrammatic representation of the Kalenjin community sub-ethnicities and their corresponding councils of elders (CEs) is indicated below.

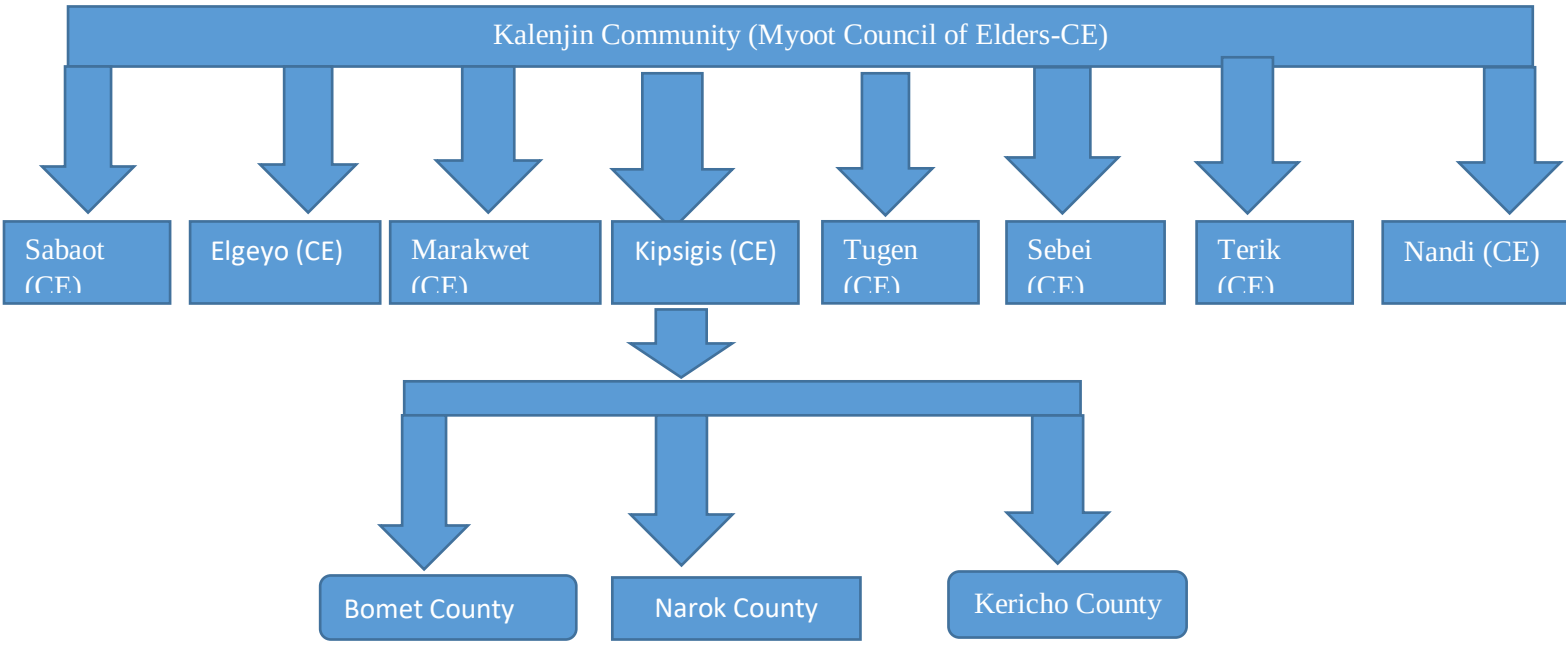

Fig 1. Diagrammatic representation of Kalenjin sub-ethnicities

According to the Kenya population census, 2009, there are 4.9 million members of the Kalenjin community, of which 1.9 million speak the Kipsigis language.[38] It is noteworthy that Narok County is cosmopolitan with the Kipsigis occupying Emurua-Dikkir sub-county and the Maasai occupying the other five sub-counties. The Kipsigis community is bordered by the Luo and Kisii to the west, Maasai to the South, Nandi to the North and Kikuyu to the East. The main economic activity of the Kipsigis is tea farming, maize farming and cattle keeping except in Emurua Dikkir sub-county, where cattle keeping is predominant.

Bomet County records a poverty level of 46.5%, Kericho County records 44.2 while Narok County records a poverty level of 33%.[39] Emurua Dikkir is one of the poorest sub-counties of

[38] KNBS, Kenya Population and Housing Census accessed from https://www.knbs.or.ke/publications/ on 20 March 2018
[39] Ibid

Narok County, with 26% illiteracy level and only 34% possessing secondary and tertiary education.[40]

1.7.3 The Kipsigis as a representation of rural Kenya (and Africa)

The Kipsigis community is suitable for this study, not only because it is largely rural and therefore reflective of the lifestyle of people in most parts of rural Kenya (where 75% of Kenyans live) but also because their traditional dispute resolution mechanisms have largely remained intact even in the face of rapid globalization. Unlike their Maasai and Luo neighbours who have been extensively studied, knowledge on Kipsigis customary law is largely anecdotal due to their classification as part of the bigger Kalenjin language group. Accordingly, most research has been based on the colonial assumption that as a language group, the seven Kalenjin sub-ethnicities have the same customs[41], an issue that has recently attracted contestation from anthropologists, sociologists, and historian.[42]

It is on the above basis that this study focused on examining how informal justice systems resolve children matters at the community level. By limiting itself to the Kipsigis community and using it as a representation of rural Kenyan ethnic communities, the study investigated the extent to which informal justice systems enforced and (or) violated children well-being through non-rights based language. Specifically, the study targeted the institutions of the chief and elders among the Kipsigis and focused on their dispute resolution processes.

1.7.4 Limitation of the study

The 2010 Constitution introduced significant reforms placing Kenya in a period of legal transition in which new statutes are enacted and previous Acts of Parliament are increasingly being amended or repealed to align them to the Constitution. These transitional processes have altered (and may continue to alter) Kenya's socio-political, legal and cultural landscape, therefore, making the legal system quite unpredictable. At the same time, the institution of elders has increasingly been transformed from an 'association' whose membership is determined culturally to institutions that have elements of modernity with retired civil servants serving as members, a reality which may influence their interpretation of customary law. The difference in lifestyle between urban dwellers and rural dwellers in Kenya may restrict the applicability of the research findings to rural parts of Kenya. Lastly, customary law is not only contested but is always changing so that the customary practices documented in this study may undergo significant changes with time thus creating a need for future studies.

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[40] Ibid

[41] An example of such a study is Monchari Riang'a, Jacqueline Broerse and Anne Nangulu, 'Food Beliefs and Practices Among the Kalenjin Pregnant Women in Rural Uasin Gishu County (2017) 13 Kenya Journal of Ethnobiology and Ethno-medicine 1

[42] See for instance Alicia Bannon, Edward Miguel, and Daniel Posner, 'Sources of Ethnic Identification in Africa' Afro-barometer Working paper Number 14, 13-14 accessed from http://cega.berkeley.edu/assets/miscellaneous_files/wgape/5_Bannon.pdf on 21 February 2019

1.8 Research methodology

1.8.1 Research designs and data collection

The study embraced a descriptive and grounded theory approach to research. Since grounded theory is an inductive approach to research, the researcher focused on building knowledge from the field data. The theoretical perspectives cited earlier were thus used only as pointers and frameworks of analysis and did not exclusively dictate the data collection process. The research process embraced triangulation, a process that encompassed collecting and analyzing information from various angles. Data collection was undertaken between July 2017 and March 2018. The first step involved developing open-ended interview questions, focus group and observation schedules, pre-visiting the fields and establishing networks with the participants in the research area. The second step involved pre-testing the research instruments and making necessary adjustments. For instance, during the pilot study, it was noted that concepts such as justice and children have several nuances among the members of the community. It was also noted that the Kipsigis community is not homogenous as the major towns are interspersed with members of the other neighbouring communities. At the same time, the pilot study observed that the area originally earmarked for the study was vast and had a rough terrain which would limit the movement of the researcher. Accordingly, the researcher decided to reduce the number of research participants. It was also observed that the tea growing areas of the Kipsigis land (Kericho and parts of Bomet) were comparatively more developed compared to the pastoralist Emurua Dikkir in Narok County, Sigor and Chepalungu in Bomet County.

To ensure that the data was ethnographically rich, the data collection was done at seven intervals of three weeks each. This involved staying within a given locality, interacting with the community members, visiting dispute resolution sessions, interviewing chiefs, attending elders' forums and interviewing children and their parents who had sought the help of the informal justice systems in specific disputes. Because some sessions were held in Kipsigis which is not the native language of the researcher, he hired a translator to assist in the data collection process. In summary, the following data collection methods were employed:

(1) Open-ended interviews: This method was used to collect data from judges/magistrates, children officers, members of *Myoot* and *Ololmasani* councils of elders, Kokwet elders, chiefs, volunteer children officers, and police officers. The researcher also interviewed the members of the community who had sought help from informal justice systems over children matters. The interviewees were selected based on the information pre-obtained from the chiefs and councils of elders. Due to the nature of the study, interviews with children were done in the presence of other family members as they were unwilling to speak openly to the researcher. To ensure easy access, children and their parents were interviewed shortly after the dispute resolution sessions.

(2) Participant observation: The researcher participated in and observed the activities of the informal justice systems in the selected areas. This included visiting chiefs' *barazas*[43] and elders' dispute resolution sessions to observe the dispute resolution and case management

[43] These are community forums that are organised and presided over by the chief. They are platforms for conveying government policy to the people and resolving disputes.

processes. Prior to the observation sessions, the researcher developed an observation schedule that informed his observation.

(3) Focus group discussions: The researcher held focus group discussions with *Kokwet* and *Ololmasani* elders. To minimize logistical costs and to fit within the working structure of the *Kokwet,* the sessions were held immediately after the dispute resolutions sessions, either under a tree in a community field or in the chief's office.

1.8.2 Sampling

The study relied on the purposive sampling method which involved deliberately identifying study participants based on their presumed understanding and role in customary law interpretation, informal justice process and children protection.

The researcher attended a total of 17 chief's *barazas*; five in Kericho, seven in Bomet and five in Narok counties. These chiefs' barazas were selected purposively based on the nature of the cases. Accordingly, only those barazas dealing with children matters were selected. Deliberate measures to access female chiefs were undertaken. To this end, four female chiefs were interviewed.

The researcher also attended 15 *Kipkaa*[44] sessions of the Kokwet elders and conducted 15 focus group discussions with the Elders across the three counties. In a bid to explore the cross-referral between children officers and informal justice systems, the researcher interviewed five children officers, one labour officer, one probation officer, two judges, five magistrates and programme officers from six non-governmental organizations dealing with children matters in the study area. The researcher also worked with the chiefs and elders to select purposively (and attend) children's cases. Accordingly, the researcher interviewed 20 children whose cases were or had been handled by informal justice systems as well as 20 parents. Two officials from the regional offices of the Kenya National Commission on Human Rights and the National Gender and Equality Commission as well as three police officers and three probation officers who had referred cases to informal justice systems were also interviewed. The researcher also interviewed NGOs which were found to be important players in bridging the gaps between the various players in child well-being among the Kipsigis. The NGOs interviewed in this study were World Vision, FIDA, KELIN African Women's Development and Communication Network (FEMNET), Centre for Rights Education and Awareness (CREAW), Gender Violence Recovery Centre (GVRC) and Legal Resource Foundation (LRF).

The researcher also held six key informant interviews with *Myoot* and *Ololmasani* council of elders. Although focus group discussions and interviews were recorded, it was observed that the children were generally unwilling to have their voices recorded. Accordingly, the researcher resorted to taking notes during the walks and informal talks with children and willing family members.

[44] Dispute resolution session

1.9 Data analysis and ethical considerations

Three sets of data were generated in this study. The participant observation reports, data on informal talks with children and the recordings of interviews and focus group discussions. The recorded data was transcribed and coded through NVIVO. Using NVIVO, the researcher organized the data into themes and nodes which then became units of analysis. These were then collated with the written reports from observation and children's informal discussions. The analysed data was then interpreted in line with the objectives of the study and research questions and used to develop the thesis.

Fieldwork and the entire research process was guided by strict ethical considerations. Prior to fieldwork, the researcher obtained a research permit from the National Commission for Science and Technology as well as an additional permit from the Chief Registrar of the Judiciary to interview judges and magistrates. The two sets of permits were presented to the education and security officials at the county and sub-county levels at the commencement of the research process. The County Education Coordinators then issued additional permits to the researcher.

Since the study involved children, the researcher took deliberate steps to ensure that the best interest of the child (ren) was considered during the data collection and analysis processes. To this end, confidentiality of the children was considered to be paramount. Thus the research instruments were often adjusted to suit the situation of the children, including but not limited to avoiding the use of recorders, having a close family member present during the informal talks with children and generally making the sessions as informal as possible.

The researcher also developed consent forms for signing by research participants. Participants were informed of their right to participate freely in the study and to discontinue their participation in the study at any time. Consent was also sought over the use of the participant's photographs in the thesis. In cases involving children, consent forms were administered to both the children and their parents. Due to the sensitivity of family matters, especially in customary context, special care was undertaken to protect the interest and well-being of participants who may suffer a negative consequence due to their participation in the research. Throughout the research, the researcher guarded against any undue influence of his personal values on the subjects and the entire research process. All the data was treated confidentially. All direct quotes have been anonymized. Any names used in the study are not the real names of the participants.

1.10 Summary

This chapter set out to lay the background of the study and highlighted the central problem in the study: the absence of any comprehensive research on the use of informal justice systems in child rights protection, especially among grassroots communities like the Kipsigis. The chapter has described the Kipsigis community and highlighted the geographical differences between Kipsigis in Bomet and Kericho and those in Emurua Dikkir-Narok County. It has set out the key theoretical frameworks as well as research questions objectives and assumptions. The chapter has also discussed the methodological and ethical approaches embraced in the study, highlighting how each methodology was tailored to suit the situation of the research participants. The following chapter relies on the research questions, propositions and objectives

to explore the conceptual, normative and historical dimensions on the use of informal justice systems and customary law in dispute resolution both regionally and domestically.

CHAPTER 2

Informal justice systems as a platform for the resolution of family disputes at the community level

2.1 Introduction

As indicated in the last chapter, this thesis seeks to explore the operational and normative framework of informal justice systems in Kenya. The chapter examines the nature of customary law as an underpinning factor in informal justice systems in Africa and the definitional and conceptual discourses on the dynamics and nature of informal justice systems. The chapter also discusses the strengths and weaknesses of informal justice systems as well as theoretical questions around access to justice for vulnerable members of the society such as children. It traces the historical background of informal justice systems and customary law and how both colonial and post-colonial governments have attempted to reform customary law institutions in line with universalized and colonial legal ideologies such as repugnancy test and the way in which these creations have resulted into two sets of customary law: lived customary law (that is the subject of this thesis) and restated customary law that is used by courts. As noted below the normative, legal and moral validity of customary law is still intensely contested.

2.2 Informal justice system or traditional justice systems? Towards a definition

Various terms have been used to refer to informal justice systems. Some scholars consider them as customary justice systems, others view them as traditional justice systems and others as non-formal justice systems.[45] Other terms commonly used to refer to these justice systems include popular justice systems and non-state justice systems.[46] Sometimes, researchers use the terms interchangeably. For instance, Celestine Musembi, in her research on non-state justice systems in East Africa defines them as any system that applies norms/rules the source of which is (or purports to be) primarily non-state in origin.[47] She uses the term interchangeably with non-formal justice systems. The assumption that a non-state justice system has the same connotation as non-formal justice systems, however, creates a conceptual problem. This is because, the degree of formality differs across regions, with some systems, such as those in Zambia, Namibia, and Malawi possessing rules, guidelines and appeal structures that are formal or semi-formal in nature and mirror the structure of formal justice systems.[48] At the same time, the traditional courts in Zambia, Nigeria, Namibia, South Africa, and Malawi derive their authority from state-sanctioned legislation.[49] Wojkowska and Kariuki consider informal justice systems

[45] See generally Francis Kariuki , 'Community, Customary and Informal Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology (2015) Strathmore University Dispute resolution Centre <http://www.strathmore.edu/sdrc/uploads/ > accessed on 26 May 2018

[46] Ibid 10-13

[47] Celestine Musembi-Nyamu , 'Review of Experience in Engaging with 'Non-state' Justice Systems in East Africa'(2003) Institute of Development Studies, Sussex University ,DFID funded research paper ,23 accessed from http://www.gsdrc.org/docs/open/ds37.pdfat 3

[48] Ibid, cf Eric Harper, *Customary Justice: From Program Design to Impact Evaluation* (IDLO 2011) 17

[49] Ewa Wojkowska, *Doing Justice How informal justice systems can contribute* (UNDP-Oslo Governance Centre 2006) 17, 50-55 cf Musembi (n 47) 13

to be non-state systems that operate outside state control or in the periphery of the state systems.[50] Their conception thus considers the informal or non-formal nature of informal justice systems not as emerging from their mode of operation but only with regard to their positioning in relation to the state. The wide scope of this definition would easily encompass dispute resolution mechanism among sports teams, gangs or dispute resolution agents in urban slums.[51] It is important to point out that whereas most researchers use traditional justice systems and informal justice systems interchangeably, their implication is largely different.[52] Elizabeth Muli, in her research on the use of *Kiama* in promoting access to justice for domestic violence victims among the Agikuyu, considers traditional justice systems such as *Kiamas* to be forms of informal justice system.[53]

Informal justice systems would thus encompass both traditional justice systems, such as *Kiama* (cited by Muli) and Turkana Council of Elders (cited by Kariuki) as well as informal dispute resolution processes presided over by chiefs. 'Informal' within this context refers to the procedure of dispute resolution rather than the foundation of their establishment.[54] This study will embrace this conception of informal justice systems. To this end, both quasi-state informal justice mechanisms such as the office of the chief[55] as well as traditional justice systems specifically, the institution of elders, will be considered as informal justice mechanisms.

For the purpose of this thesis, informal justice systems are defined as community-based justice institutions that resolve disputes based on customary law, operate outside the structure of the judiciary and have informal dispute resolution procedures. Although scholars like Akoth have argued that 'traditional justice institutions' in modern societies have been infiltrated by modernity and are therefore not purely traditional, the thesis is based on the assumption that tradition just like culture, is not static but is an evolving phenomenon.[56]

[50] Kariuki Francis (n 45) 4
[51] Sally Falk Moore, 'Law and Social Change: The Semi-autonomous Social Fields as an Appropriate Subject of Study' (1973) 7 (4) Law & Society Review 719, 722
[52] See Wojkowska (n 49) 9
[53] Elizabeth Muli , '*Kiamas*: Rethinking Access to Justice in Domestic Violence Cases in Kenya' (Stanford University PhD thesis 2004)
[54] UNDP, *Justice for All? An Assessment of Access to Justice in Five Provinces of Indonesia* (UNDP 2006) Xiii, 8-9
[55] Although the chief operate through the National Government Co-ordination Act, 2013 and the Chief's Act, 1937, neither of these Acts confers judicial or quasi-judicial authority to the chief. The Chief's power and legitimacy in this respect is derived from community acceptance and the overlap between the current position of the chief and the traditional foundation of the pre-colonial chief.
[56] For details see Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press 2006)134

2.3 Overview of customary law and informal justice systems in pre-colonial Africa

2.3.1 Definition of customary law

The concept of law has no universally accepted definition, neither is such a definition desirable nor possible due to the complexity and variety of legal systems across the world.[57] Accordingly, customary law lacks a uniform definition. At the same time, the study of customary law comes with the additional challenge of interpretation and translation, an issue that has been the subject of intense debates among legal anthropologists, key among them the famed Bohannan and Gluckmann debate.[58] According to Bohannan, customary law should be studied using the terms and concepts used by the subjects of the same (customary) law. On the other hand, Gluckmann argued that this approach would be self-limiting as it would make it impossible to undertake a comparative analysis of two or more legal systems. This thesis attempts to reconcile these two positions by examining the Kipsigis understanding of the concept of law and how this conception is used in informal justice systems to protect and (or) respond to child rights violations. Chapter four of this thesis specifically responds to this concern.

Customary has been considered to be the unwritten norms and practices of small scale communities which date back from pre-colonial times but which have undergone transformation due to colonialism and capitalism.[59] Woodman, echoing such sentiments, observes that 'What is called customary law is often closer to observed social norms (practiced law) than the state law imported by colonialism, and indeed evolves in line with social and economic change.'[60] Thus the lawyer's customary law, contained in law books and case law is fundamentally different from the 'sociologist's customary law' which Woodman considers to be the customary law that is lived and experienced daily by the people.[61] The sociologist's customary law, Woodman opines, would be worthless to the lawyer, due to its loose interpretation of customary law, while the lawyer's customary law, to the extent that it ossifies law, fails the sociologist's tests.[62] To reconcile the tension between the two disciplines, Woodman avers, following the paths of Oliver Wendel Holmes, that customary law is a prediction of what courts, given the culture of a particular community would proclaim their customary law to be.[63] It is crucial to examine, how customary law, as lived forms of law,

[57] For succinct reasons, this study has avoided a full scale discussion on the concept of law. However approaches to the understanding of law range from Hart, who considers law to be a unity of primary and secondary rules, Austin who sees it as a command of the sovereign backed by sanctions, Kelsen who considers law to be the grund norm and all norms that derive their validity from the grand norm, Dworkin who sees law as being made of rules and principles and the natural law scholars like Finnis, Fuller, and philosophers like St. Augustine of Hippo and Aquinas who equate law to morality.
[57] See generally Philip Selznick, 'Law in Context Revisited'(2003) 30 Journal of Law and Society 177
[58] For an overview of the Gluckmann-Bohannan debate, see Anthony Good, 'Folk Models and the Law' (2015) 47 (3) Journal of Legal Pluralism and Unofficial Law 423
[59] See Winfred Kamau, 'Judicial Approaches to the Applicability of Customary Law to Succession Disputes in Kenya' (2015) East African Law Journal 141, 163
[60] Gordon Woodman, 'Customary Law in Common Law Systems' (2001) 32 (1) IDS Bulletin 28
[61] Gordon Woodman, 'Some realism about Customary Law – The West African Experience' (1969) Wisconsin Law Review 128, 146
[62] Ibid
[63] Ibid 151-152

create and recreate obligations to children and how these are then enforced through informal justice systems.

The dichotomy between 'customary law' and 'law' (or state law) is a product of colonial interaction with non-western law and the inability to locate customary law within the theoretical and normative foundation of western law.[64] Thus as Twining suggests[65], customary law, just like state law, international law or any other form of law traces its validity from normativity, boundlessness (operating within a given boundary), institutionalization, moral and social utility.[66] Griffith observes that a proper understanding of customary law must start by 'tracing the specific, concrete conditions under which customary law is brought into being and mobilized by various actors because it opens up spaces for recognition that are not dependent upon the state for its validity.'[67]

For conceptual clarity, this study will consider customary law to be forms of normative ordering that exist within collectivities and which draw their validity from normative practices, social experiences, local moralities and the habitual observance by the members of the collectivity. This definition is considered appropriate because it recognizes the everydayness and intra-boundary nature of customary law.

Having defined customary law and established its underlying features, the following section examines the historical development of customary law in Kenya.

2.3.2 Historical development of informal justice systems and customary law in Kenya

Kenya, as a political unit did not exist until 1895 when the British government made Kenya a British Protectorate.[68] Instead, there were different ethnonationalities each with its political, socio-cultural, economic legal and administrative system.[69] The British, however, dismantled these systems of administration and established state law and a central government that was in charge of the entire protectorate.[70] It is noteworthy that what constituted state law included ordinances made in the colonial Legislative Council in Kenya as well as several Acts of

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[64] Ann Griffith, 'Customary Law in a Transnational World: Legal Pluralism Revisited' (Paper delivered during the Conference on Customary Law in Polynesia, 12th October, 2004) accessed from http://www.lianz.waikato.ac.nz/PAPERS/symposium/Customary%20Law%20in%20a%20Transnational%20World.pdf

[65] Twining uses the word 'normative ordering' to refer to customary law and observes that all forms of law are essentially forms of normative ordering. For details see, William Twining, 'Normative and Legal Pluralism: A Global Perspective' (Paper delivered during the seventh annual Herbert Bernstein Memorial Lecture in International and Comparative Law held at Duke University School of Law, April 7, 2009) 483

[66] Ibid 482-484

[67] Ann Griffith, 'Customary Law in a Transnational World: Legal Pluralism Revisited (Conference on Customary Law in Polynesia, 12th October, 2004) 12 accessed from **http://www.lianz.waikato.ac.nz/PAPERS/symposium/Customary%20Law%20in%20a%20Transnational%20World.pdf**

[68] See Great Britain Colonial Office, 'The Colony and Protectorate of Kenya (1920) 56 (5)The Geographical Journal 403

[69] Ali Mazrui, 'Nationalism, Ethnicity, and Violence' in Wiredu Kwasi(ed*) A Companion to African Philosophy* (Blackwell Publishing 2004) 480

[70]The protectorate later became the colony of Kenya, cf Dick Cashmore, 'Studies in District Administration in The East Africa Protectorate (1895-1918)' (Cambridge University PhD Thesis 1965) accessed from <http://www.african.cam.ac.uk/images/files/titles/cashmore >

Parliament imported from England and India. For instance, the British relied on the Indian Land Acquisition Act, 1894 to acquire native land for construction of the Kenya-Uganda railway while the Married Women Property Act, 1882, an Act of Parliament in England, was considered as law in Kenya up until 2013 when the current Matrimonial Property Act, 2013 came into being.[71] British involvement in the affairs of the natives was further entrenched in 1920 when the Protectorate of Kenya was changed into a colony, essentially converting all the native land into crown land and turning the natives into subjects of the British Crown (albeit without rights).[72] British colonial rule in Kenya lasted until 1963 when Kenya gained independence.

Before the onset of European colonial rule in Kenya, customary law was the only law and was mainly applied through informal justice systems.[73] Every community had its own way of resolving disputes through customary law. Some communities, especially those with centralised authority, had a hierarchical justice system complete with an appeal structure while more decentralised systems often had councils of elders presiding over all disputes at all levels.[74] However, elders were not homogenous and the nature of conflict often determined which elder(s) would preside over a given dispute.[75] Minor disputes such as intra-family disputes could be decided by clan elders while inter-communal disputes involved community elders. Age, sex, experience, wisdom and an individual's standing in the family and community determined the membership of councils of elders.[76]

Upon colonization, common law applied to disputes between Europeans as well as to disputes involving a European and an African.[77] Disputes between Africans were subject to customary law. Common law was the official state law while customary law was restricted to the private sphere, to the extent that it 'was not repugnant to justice or morality'.[78] Shivji observes that under colonial administration, all criminal offences were determined through state courts because the entire enterprise of traditional criminal law complete with its punishment models were declared as repugnant to justice.[79] The same fate befell some social practices that were criminalised and made punishable by state law. For instance in Kenya, the fluid notion of witchcraft was concretised by the colonial regime and criminalised through the Witchcraft Act that remains law today.
The attitude of informal justice systems and community members towards forms of 'western criminal law' such as the imprisonment of children in conflict with the law and parents who offend their legal obligation to the children is a question that underpins this thesis, especially in view of the ethnographic study conducted among the Kipsigis.

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[71] See Peter Onyango, *African Customary Law* (Law Africa 2013) 21
[72] Great Britain Colonial Office (n 64)
[73] Sarah Kinyanjui, 'Restorative Justice in Traditional Pre-colonial "Criminal Justice Systems" in Kenya'(2010) 10 Tribal Law Journal 1, 4
[74] Ibid
[75] See generally Francis Kariuki, 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities'(2015) 3(2) Journal of Alternative Dispute Resolution 30
[76] Ibid
[77] Martin Chanock , 'Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform' (1989) 3 International Journal of Law and the Family 72, 73
[78] Duncan Ojwang, 'Dismantling Jurist Stereotypes Towards the Traditional Justice Systems: Can Something Good come from Article 159 (2) (c) of the Constitution' (2015) 3(2) Journal of Alternative Dispute Resolution 192, 201 cf Onyango (n 71) 43
[79] Issa Shivji, 'The Rule of Law and Ujamaa in the Ideological Formation of Tanzania' (1995) 4 (2) Social & Legal Studies 147 accessed from https://doi.org/10.1177/09646639950040020

The colonial government also established native courts where disputes were heard based on customary law. The native courts were presided over by the elders.[80] Although the British colonial government tried to promote the use of customary law, scholars have argued that the introduction of the native courts was not based on a genuine interest in the promotion of customary law jurisprudence. Rather they were considered as instruments of governance.[81] The restricted scope of application of customary law, colonial hand in the determination of 'judges' in native courts, and the repugnancy test have been cited as key illustrations of the motive behind the introduction of the native courts.[82]

Upon independence, native courts were abolished in Kenya and restated customary law became a basis of determining cases involving personal law such as succession, marriage, and divorce in state courts.[83] Family law, in general, continues to encompass elements of customary law which form a basis of the resolution of major disputes in this area of law. The next section examines the incorporation of customary law within formal state law in Kenya.

2.3.3 Restated or lived customary law? Reviewing the contestation

Historically, customary forms of normative ordering such as social norms developed spontaneously in their communities of practice. However, the colonial administration(s) alienated them from their community of origin resulting into the emergence of the term 'customary law' which could mean; (a) the official body of customary law employed in the formal justice systems (b) customary law employed by academics in law schools for academic purposes (c) the living customary law which is found among the people.[84] As observed by Bennet, the first two conceptions although markedly different from the actual practice of customary law among the people, have continued to influence the interpretation of customary law both in academic and legal circles.[85]

As part of its initiative to formalize the use of customary law, the colonial government sponsored or supported anthropological initiatives which were meant to restate customary law.[86] These project included documentation and codification of the 'customary law' of the various communities in Kenya.[87] Legal scholars and anthropologists went around the country and conducted interviews with community members on what exactly was considered to be customary law in their communities.[88] Although this initiative resulted in more regularised, predictable and formal set of customary law the respondents who were consulted during the codification process were not only community elites (most of whom had undergone western

[80] Historical account indicate that the term 'Native Courts' and 'Native Tribunals' both refer to institutions set up pursuant to the Native Courts Ordinance of 1907. For details on the native courts see the website of the Kenyan Judiciary< http://www.judiciary.go.ke/portal/page/our-history> accessed on 21 May 2018
[81] Brian Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2007) 30 Sydney Law Review 375, 389
[82] Ibid
[83] See generally Judiciary (n 80)
[84] Tom Bennet, *A sourcebook of African Customary Law for Southern Africa* (Juta 1991) Preface
[85] Ibid
[86] See generally, Contran Eugene, *Restatement of African Law –Kenya: The Law of Marriage and Divorce* (Butterworth 1968)
[87] ibid at xi
[88] Ibid at xii

education) but were also employees of the colonial administration and predominantly male.[89] The voices of women were therefore ignored in the restatement of customary law, resulting in lopsided documentation.[90]

The state-sponsored 'legalization' of customary family law and the disruption of traditional family formations led to a new version of customary law which suited the colonial administrators and the new family structures but diverted from the lived customary law.[91] Thus although codification was meant to make customary law more predictable and in line with European law, it ended up compromising the growth of customary law.[92] This codification undertaken by male colonial administrators and their male African counterparts therefore not only ossified customary law by making it static but also misinterpreted it in a way that disadvantages women.[93] At the same time, the application of the common law doctrine of precedence further robbed customary law of its flexibility as judges were bound to determine similar cases based on previous judgments without focusing on the unique circumstance of the dispute.[94]

Whereas lived customary law has evolved to be comparatively more accommodative to women's rights as illustrated by, for instance, the inclusion of women into councils of elders, restated customary law, which was developed through male lenses has remained rigid and therefore unable to protect the women. Accordingly, Tsanga and Stewart argue that any continued use of the restated customary law in court without appreciating the changes that have occurred over time works against progressive women rights realization in Africa. It is within this context that Mbote suggests that customary law should be interpreted within its pre-colonial context where its application was guided by the unique circumstances of the disputants and the changing socio-cultural dynamics.[95]

Both state and customary law play a central role in ordering social life in Africa. Rejecting the legal centralist characterization of lived customary law as non-law due to the fact that it does not derive its authority from state recognition, Woodman observes that it would be legally undesirable for one set of law to claim superiority over the other and that both the living customary law and restated customary law are important in the administration of justice in Africa due to their contextual approach to dispute resolution and social ordering.[96] Although Woodman generally advocates for the embrace of lived customary law on the basis that it reflects the everydayness of peoples lived experiences, he notes that restated customary law may help cure or reconcile inconsistencies in trial processes that result from the statements of misleading witnesses.[97]

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[89] Mbote Kameri, *Gender Dimensions of Law, Colonialism and Inheritance in East Africa: Kenya Women's Experience* (International Environmental Law Research Centre 2002) 12
[90] Ibid
[91] Martin Chanock, 'Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform'(1989) 3 International Journal of Law and the Family 72, 72
[92] Onyango(n 71) 23, 30 cf Banda, Fareda, 'This one is From the Ladies: Thank you Martin Chanock, Honorary African Feminist (2010) 28 (2) Law in Context 8, 10
[93] Mbote (n 86)
[94] Ibid
[95] See Mbote (n 89) 4 cf Kamau (n 59) 164
[96] Gordon Woodman, 'Legal Pluralism and the Search for Justice' (1996) 40 Journal of African Law 152, 157
[97] Ibid

Despite the fact that the use of customary law in state justice systems is highly researched and documented, the application of customary law by non-formal institutions such as informal justice systems, especially in the question of child rights and well-being is largely a grey area. However, customary law is highly recognised in the wider Kenyan legal spectrum as discussed below.

2.4 Customary law in contemporary formal Kenyan legal systems

Customary law crosscuts across formal and informal justice systems. The colonial incorporation of customary law into formal law in Kenya has resulted in the continued presence of customary law in Kenya's Constitution, statutes and case laws.

In her research on customary law and constitutions in Africa, Katrina Cuskelly has noted that the Constitutions of 33 African countries encompass some recognition and or protection of customary law.[98] In line with this trend, article 159 (2) of the Kenyan Constitution states that courts are allowed to use reconciliation, mediation, arbitration, and traditional justice system in resolving cases, for as long as they do not contravene the bill of rights, are not repugnant to justice and morality or inconsistent with the constitution and (or) any written law. This article is perhaps the most pronounced 'legal' justification for the strengthening of informal justice systems in Kenya. Article 2(4) of the Constitution notes that any law, including customary law, that is inconsistent with the constitution is invalid to the extent of the inconsistency. Additionally, article 67 (f) of the Constitution specifically mandates the National Land Commission to employ alternative dispute resolution mechanisms in the resolution of land conflicts.

Section 5(f) of the National Land Commission Act actualizes the above provision by requiring the Commission, in line with the constitutional requirement, to use traditional justice mechanisms to resolve land disputes.[99] This article rests on the assumption that land rights and land ownership are so much integrated with customs that it would be impossible to address land problems without addressing their cultural underpinning. Article 11 of the Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people. It encourages the state to 'Promote all forms of national and cultural expression through literature, arts, traditional celebrations, science, communication, information, mass media, publications, libraries, and other cultural heritage.' Within this context, traditional justice systems are considered as forms of cultural expression and must be promoted in line with the constitutional requirement.[100]

The Judicature Act, 1967 emphasizes the significance of customary law in resolving civil disputes in Kenya.[101] Section 3 (2) of the Act notes that courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it

[98] See Katrina Cuskelly, *Customs and Constitutions: State Recognition of Customary Law Around the World* (IUCN 2011) 6
[99] National Land Commission Act available at http://www.kenyalaw.org/lex//actview.xql?actid=No.%205%20of%202012 accessed on 3rd February 2017
[100] See art 11 (2) of the Constitution of Kenya
[101] See the Judicature Act, 1967

so far as it is not repugnant to justice and morality or inconsistent with any written law. Section 3 of the Magistrates Court Act, 2015 highlights the list of claims that can be brought to court under customary law which include:(a) land held under customary tenure;(b) marriage, divorce, maintenance or dowry;(c)seduction or pregnancy of an unmarried woman or girl;(d) enticement of or adultery with a married person;(e) matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption and legitimacy;(f) intestate succession and administration of intestate estates, so far as not governed by any written law.[102]

Section 15 of the Industrial Court Act allows the court to embrace alternative dispute resolution such as conciliation, mediation and traditional dispute resolution mechanisms subject to constitutional provisions under article 159.[103] Whereas conciliation and mediation have time and again, been used to resolve labour disputes in Kenya, there is very little evidence that traditional dispute resolution mechanisms have been used in industrial disputes. However, with its restorative approach, traditional justice systems may provide a good platform for resolving such disputes.

Informal justice systems are also encouraged in marriage, succession and matrimonial property. Section 68 (1) of the Marriage Act, 2014 states that customary marriages can only be dissolved by the courts after a process of conciliation or customary dispute resolution.[104] The Succession Act, 1981 perhaps reflects the strongest recognition of the inconsistency between the Western conception of succession and African understanding of succession.[105] Whereas the Act is largely modeled along British laws of succession, it makes attempts to infuse customary structures and recognizes the rights of the 'extended family' and women in polygamous marriages to inherit property.[106] To this end, the Act defines dependant(s) as:

> The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death; the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death.[107]

The Act also states that the estates of all those who died before 1981(the commencement date for the Act) would be subject to customary law.[108] In a reflection of the variation in the practice of customary law in Kenya, the Act mandates the Minister of Lands to gazette areas where customary law would be used exclusively in determining succession disputes concerning land meant for agriculture and livestock.[109] The Act is therefore inactive in these areas with respect

[102] Magistrate courts Act, 2015
[103] See Industrial Courts Act, 2011
[104] Marriage Act, 2014
[105] See the Succession Act, 19781
[106] The notion of extended family is alien to African conception of family. The Act recognizes this reality by entitling 'extended family' members to inheritance. Cf Ocholla-Ayayo, 'The African Family in Development Crisis in the Second Millennium' (2000) 7 (1) Journal of African Anthropologist 84, 94
[107] Succession Act, 1981, s 29
[108] Ibid s 2(2)
[109] Ibid s 32

to disputes over agricultural and livestock land and such disputes have to be exclusively determined through the customary law of the inhabitants. As at 2017, the gazetted counties were: Wajir, West Pokot, Turkana, Tana River, Kajiado, Garissa, Mandera, and Lamu.[110] Muslims are also exempted from the Act and all their succession disputes are determined using Sharia law.[111] The Succession Act also allows an individual to make a will indicating that his estate will be divided based on customary law upon his demise.[112] The Matrimonial Property Act, 2013 also envisions the use of customary law in the resolution of matrimonial disputes. Section 77 notes that:

> During the division of matrimonial property between and among spouses, the customary law of the communities in question shall, subject to the values and principles of the Constitution, be taken into account including (a) the customary law relating to divorce or dissolution of marriage;(b)the principle of protection of rights of future generations to community and ancestral land as provided for under article 63 of the Constitution; and (c)the principles relating to access and utilization of ancestral land and the cultural home by a wife, wives or former wife or wives.[113]

Customary law, therefore, remains dominant in many formal laws in Kenya. Their incorporation in state law is born out of the realization that in many parts of the country, customary law is still a dominant force not only in organizing society but also in resolving disputes. The following section looks at how the repugnancy clause has been used to 'marginalise' customary law by subjecting it to tests that are founded on either Christianity or Western civilization and how courts by rigidly applying this doctrine, has over-elevated the negative aspects of customary law, therefore, diminishing the positive aspects of customary law and compromising its development.

2.5 Customary law and the repugnancy test

The repugnancy test only allows customary law to be used subject to morality and justice.[114] Customary law has been used to justify different forms of injustices such as female genital mutilation, beading of girls, and early marriage among other violations.[115] This reality informed the development of the repugnancy test by colonial powers in Africa and has continued to justify its use to date. However, the repugnancy clause was not homogenously used to condemn all African customary practices simply on the basis that they differed from European customs.[116] Rather it was selectively applied by specific colonial officers to enforce their own

[110] Ibid cf Kamau (59) 151
[111]Ibid s 2 (4)
[112] Ibid s 5 (1)
[113] See Matrimonial Property Act, 2013, s 11
[114] See for instance Onyango (n 71) 43
[115] For detailed discussion, see Oloka-Onyango, Minneh Kanne and Abdul Tejan, 'Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor'(World Bank conference on the 'New Frontiers of Social Policy: Development in a Globalizing World, Arusha - December 12-15 2005) accessed from http://siteresources.worldbank.org/intranetsocialdevelopment/Resources/reassessingcustomary.pdf
[116] Alice Armstrong, 'Away from Customary Law' (1988-89) 27 Journal of Family law 339, 343

understanding of what was moral or not so that a specific practice could be determined as being repugnant by one set of officials in the empire (or colony) and acceptable by another set.[117]

The repugnancy test has resulted in what Franz Von Benda Beckmann calls the 'scapegoating of customary law'. According to Beckmann, development actors and governments often cite customary law when accounting for the prevalence of a specific undesirable social practice, without considering the variations within and between customary laws and the changing patterns of the same.[118] The idea that customary law is the problem and that state law should be enacted to tame customary law ignores the nature of customary law as part of the lived experience of the people and its potential to outgrow or address the weaknesses, and creates legal imperialism over customary law, an issue that other scholars have cited as having contributed to the complete disregard of international human rights instruments such as UNCRC by community members.[119]

The weak normative foundation of the repugnancy test and its (potential for) abuse,[120] perhaps explains why the South African High Court declared the repugnancy clause unconstitutional. The court noted that customary law is only bound by the standards of the Constitution and not by any other standards of morality or justice.[121] In its judgment, the Court observed that:

> The test is not, in my view, whether or not African customary law is repugnant to the principles of public policy or natural justice in any given case. The starting point is to accept the supremacy of the Constitution, and that law and/or conduct inconsistent therewith is invalid. Should the court in any given case come to the conclusion that the customary practice or conduct in question cannot withstand constitutional scrutiny, an appropriate order in that regard would be made. The former approach which only recognises African law to the extent that it is not repugnant to the principles of public policy or natural justice is flawed. It is unconstitutional.[122]

In Kenya, the repugnancy clause is reflected in article 159 of the constitution which states that 'Traditional dispute resolution mechanism shall not be used in a way that contravenes the bill of rights, is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality or is inconsistent with the constitution or any other written law.'[123] A similar sentiment is reflected in the Judicature Act, 1967 which declares that 'The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil

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[117] Ibid

[118] Franz Von Benda Beckmann, 'Scapegoat and Magic Charm, 'Law in Development Theory and Practice' (1989) 28 Journal of Legal Pluralism 129

[119] Ibid, cf Twining (n 62)cf Yvan Droz, 'Conflicting realities' in Karl Hanson and Olga Nieuwenhuys (eds) *Reconceptualising Children's Rights in International Development* (Cambridge University Press 2012) 115, 116

[120] It is not the position of this study that all customary laws should be homogenously enforced nor that they should be subjected to the repugnancy test. It is contended that there should be a selective application of customary law on a case by case basis, to protect members of the relevant communities from the potential harm that would result from holistic application.

[121] Mabuza Vs Mbatha 2003 (7) BCLR 743 (C) accessed from http://www.saflii.org/za/cases/ZAWCHC/2002/11.html on 21 January 2017 cf Alexkor Ltd and Another v Richtersveld Community [2003 ZACC 18]

[122] Mabuza (n 121) par 32

[123] Art 159 (3)

cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law.'[124]

The ambiguity with regard to whether a particular practice is moral or otherwise revisits the age-old question of the relationship between law and morality. The extent to which the repugnancy test, to the extent that it limits choices within a given moral standard, violates liberties has been criticised by among others, Duncan Ojwang who sees the repugnancy test purely as an unnecessary vestige of colonialism that has continued to inhibit the development of customary law.[125]

Notwithstanding its questionable foundation, the repugnancy test (through the language of Christianity, morality, ethics or government policy) continue to dominate many legal disputes and discourses in Kenya. This thesis, therefore, explores how actions (or inactions) that are considered as repugnant to justice and morality and child well-being by courts and state law in Kenya constitute social practices among the Kipsigis and how informal justice systems respond to (or perpetuate) their prevalence. Specifically, this thesis attempts to unlock this puzzle and examines how state agencies that are charged with the application of the hegemonic conceptions of public morality, continue to interact with community-based structures, which are the objects of the hegemonic policies and laws, to promote child well-being. The extent to which this collaboration generates tangible results for children and the community is equally an issue that will be explored in later chapters of this thesis.

2.6 Strengths of informal justice systems and customary law in dispute resolution

Socio-cultural and economic factors have made it impossible for some women to seek justice from the formal justice system, leaving informal justice systems to be the only justice avenues available for them.[126] Irene Anying argues that a multiplicity of justice providers at the community level provide an opportunity for members to engage in forum shopping as they seek the most just option for their individual circumstances from the multiple shopping fora.[127] Within this context women choose between the many varieties of disputes resolution systems, resulting in what Keebet Von Beckmann calls forum shopping. [128] In addition, forum shopping is also characterized by shopping forum in which dispute resolution agents seek social-political relevance by shopping for conflicts that they can then resolve to maintain their relevance in society.[129] One advantage of forum shopping is that it provides the aggrieved women and as

[124] S 3 (2)
[125] Duncan Ojwang, 'Dismantling Jurist Stereotypes Towards the Traditional Justice Systems: Can Something Good come from Article 159 (2) (c) of the Constitution' (2015) 3(2) Journal of Alternative Dispute Resolution 192, 201
[126] Joireman, Sandra and Henrysson, Elin, 'On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii, Kenya' (2009) Richmond University Political Science Faculty Publications No 71, 25-26 accessed fromhttps://pdfs.semanticscholar.org/f295/61df9c13ff08484d348080a3e4c82d47f16c.pdf on 10 May 2017
[127] See also Irene Anying, *Re-Envisioning Gender Justice in Access and Use of Land Through Traditional Institutions* (Danish Institute of Human Rights 2011) 31
[128] Keebet Von Beckmann, 'Forum Shopping and Shopping Forums: Dispute Processing in a Minangkabau Village in West Sumatra' 1981 (19) Journal of Legal Pluralism 117
[129] Ibid

shall be seen in later chapters, children with a variety of option from where they could pursue justice or protection.[130] At the same time, the multiple forums are often suited for different cases so that the disputants can anticipate and therefore prepare for the kind of outcome that could result from a particular system. Thus the varied systems complement each other.[131]

Informal justice systems are also important in achieving restorative justice for the individual. To this end, they are part of a well-structured time-proven social systems geared towards reconciliation, maintenance, and improvement of social relationships.[132] They are not only flexible but are also economic, expedient and impartial. For instance, Muimali highlights how the Somali rely on *maslah,*[133] in dispute resolution.[134] He explains that hearings before the *maslah* are done in a rational and impersonal manner. Both the plaintiff, a representative of his family, the accused and the accused's family representative are heard before a final decision is made. At the end of the session, the group (or person) that is found to be at fault is expected to pay compensation to the injured family, person or clan. The amount of compensation is determined based on the severity of the wrong.[135] Muimali equally notes that the reliance on informal dispute resolution processes among the Kisii is so prevalent that sometimes witnesses and disputants fail to attend court proceedings and opt to resolve the dispute through the council of elders or other informal mechanisms.[136] Similarly, a study by the Collaborative Centre for Gender and Development (CCGD) on gender-based violence indicated that although gender-based violence is rampant in families in Kenya, only 5.7% of these cases are reported to state actors, with the police only receiving 1.6% of the cases and only a meagre 0.1% of the cases received ending up in court.[137] A bulk of the cases are reported to non- state actors who often use informal dispute resolution mechanisms.

As indicated above, most victims of violence were interested in forms of justice that would result in ending the violence and not necessarily those that resulted in the imprisonment of the perpetrator. This observation corresponds to the findings of Mercy Deche in her study on the use of informal justice systems in addressing child abuse cases in Kwale and Mombasa. Deche observed that most victims of child abuse prefer informal justice systems to formal justice systems because according to them, justice implies cessation of the abuse and not imprisonment of the offender, who would sometimes be their primary caregiver such as a parent.[138] Even

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[130] Ibid
[131] Winnie Anying and Quentin Gausset, 'Gender and Forum Shopping in Land Conflict Resolution in Northern Uganda' (2017) 49 Journal of Legal Pluralism and Unofficial Law 353
[132] Penal Reform International, *Access to Justice in Sub Saharan Africa: The Role of Traditional and Informal Justice Systems* (Penal Reform International 2000) 1 accessed from http://www.gsdrc.org/docs/open/ssaj4.pdf on 8th July /2017
[133] Customary courts among the Somali. These courts rely on customary practices and Islamic religion in decision making.
[134]Busalile Muimali, 'Human Rights Perspective of Informal Dispute Resolution Processes and the Criminal Justice System in Kenya' (2015) 2 (2) Law Society of Kenya Journal 1, 9
[135] Ibid
[136] Ibid
[136] Ibid 10-11
[137] See Collaborative Centre for Gender and Development, 'Reducing Vulnerability to Sexual and Gender Based Violence in Kenya' (2015) 39 accessed from http://ccgdcentre.org/index.php/publications/reports accessed on 25 February 2017
[138] See Mercy Deche, *Legal Response to Intra-familial Child Sexual Abuse in Kenya: A case for Informal Justice* (Danish Institute For Human Rights 2013) 11

when compelled into the formal justice system, such victims become hostile witnesses or altogether abscond the court proceedings leading to miscarriage of justice.[139]

2.7 The implication of informal justice systems on women's and children's rights: Mapping the weaknesses

Notwithstanding the above strengths, informal justice systems have certain normative and structural weaknesses which are majorly manifested against women. Thus, on one hand, informal justice systems provide accessible, quick and timely justice processes for women and children while on the other, it excludes them not only by making adopting procedures that militate against their active participation but also by making decisions that sometimes, violate women and children rights.[140]

It is noteworthy that customary law conceptions of property ownership have interacted with modern conceptions of the same to exclude women from land ownership and therefore weaken their resilience in the face of HIV Aids, poverty and voicelessness.[141] Writing about women's exclusion from clan and family land in Tanzania, Ambreena Manji has observed that:

> [T]he assumption is that a woman will be provided with land, in whatever capacity, by her marital clan, and therefore has no need to inherit from her natal clan. Secondly, it is thought that giving women the right to hold property in their natal clan land will lead to interference in such land from strangers, that is a woman's husband and his family who are non-kins. There is a similar fear on the part of a woman's marital clan that she may alienate clan land on her remarriage or otherwise to outsider...Neither her natal nor her marital clan recognize her claims to clan land, each one treating her as though she belonged to the other and therefore constituting a threat to clan land.[142]

As Manji avers, exclusionary assumptions reflected both in state law as well as in customary law interact to impoverish women. The woman is thus at a disadvantage from both formal and informal justice systems and nothing short of comprehensive land reforms can emancipate such a woman.[143] However, such emancipatory endeavours must first gain social legitimacy from the community if they are to meaningfully empower women, an issue that may require meaningful cross-cultural dialogue. At the same time, it is noteworthy that informal justice systems are part of women's cultural experiences and that alienating them from these processes is a reflection of disempowerment rather than progress. Accordingly, the legal empowerment of women must start by examining their role and interaction with informal justice systems. As argued by Musembi:

> [S]ome women draw a sense of self and community, as well as their (sole) expectation of social and economic security from customary law. Thus, an

[139] Ibid 20
[140] Emily Kinama, 'Traditional Justice Systems as an Alternative Dispute Resolution Under Article 59 of the Constitution' (2015) 1 (1) Strathmore Law Journal 22, 27
[141] Ambreena Manji, 'The Case for Women's Rights to Land in Tanzania: Some Observations in the Context of AIDS' (1996) 3 (2) Utafiti 11
[142] Ibid 17
[143] Ibid

> abolitionist approach devalues the meaning that the 'cultural sphere' has for many women. It also amounts to asking women to choose between their gender identity as women and their cultural identity.[144]

As noted above informal justice systems and customary law fail the test of equality with regards to women's rights because they are mostly male-dominated and patriarchal in orientation.[145] Additionally, in many customary justice systems, women are routinely discriminated against with respect to their roles as guardians, their inheritance rights, and their right to freedom from sexual and domestic violence. Further, sanctions may be exploitative and/or abrogate women's basic human rights; such sanctions include the practices of wife inheritance (where a widow is forced to marry a male relative of her deceased husband), ritual cleansing (where a widow is forced to have sexual intercourse with a male in-law or stranger), forced marriage, and the exchange of women or young girls as a resolution for a crime or as compensation.[146]

One additional challenge with informal justice systems is its focus restorative justice. Restorative justice systems, such as informal justice processes, cannot comprehensively address women's rights concerns because they are anchored on apology and forgiveness, attributes that are used by the male-dominated systems to manipulate women.[147] This reality is demonstrated by the fact that restorative justice presumes equality between the parties and ignores the cultural economic and normative inequality between men and women, women and children and parents and children. This inequality not only influences the decisions of the chief or elder but also limits the capacity of the aggrieved parties, especially women and children to re-assert their rights. It is against this background that institutions like CEDAW have criticised community justice processes on the basis that they contribute to the prevalence of domestic violence and the oppression of women.[148]

Notwithstanding their weaknesses, informal justice systems cannot be totally dismissed on account of the questions of equality and participation for women and children because as argued by Woodman, one weakness in a legal system cannot justify its blanket condemnation.[149] Additionally, even the formal justice systems are considered as valid notwithstanding the high level of corruption, inefficiency and backlog that characterise them. At the same time, it is important to note that women are increasingly getting involved in informal justice systems. For instance, in a study on women's use of informal justice systems among coastal communities of Kenya, FIDA-Kenya noted a high level of women's involvement in informal justice systems, both as clients and members. The study even observed a higher number of women than men in some committees of the *'Baraza la Wazee wa Mtaa*'[150] and noted (with approval) the presence

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[144] Ibid
[145] Wilfried Schärf (n 4)
[146] Harper (n 48) 23
[147] Julie Stubbs, 'Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice' (2007) 7 (2) Criminology & Criminal Justice 169
[148] CEDAW 'General recommendation on women's access to justice' (23rd July,2015) accessed from https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf
[149] Gordon Woodman, 'Some Realism about Customary Law-The West African Experience' (1969) Wisconsin Law Review 128, 162
[150] These are village committees among the Swahili of Coastal Kenya. The word directly translates to 'Committee of village elders'

of one committee with a female chairperson.[151] The study also observed that even exclusively male *'Baraza la Wazee wa Mtaa'* were open to female membership, but insisted that the said women must first demonstrate an excellent understanding of Islamic law.[152] This observation reflects Agnes Meroka's view that addressing the strategic and practical needs of women must start with an appreciation of the intersectional foundation of women's insubordination.[153] That is to say that such a process must appreciate the fact that women challenges are a product of several layers of socio-economic and cultural factors which all interact to produce structural inequality.[154] Thus although Islamic law scholars such as Shaheen Ali would argue that classical Islamic law is not inherently exclusive and oppressive to women, the obstacle put forth by the *'Baraza la Wazee wa Mtaa*' would be difficult for most women to surmount as the Islamic clergy, who are perceived to possess this high understanding of Islamic law, are almost exclusively male.[155] Due to the fact that selective (mis)interpretation of Islamic law and customary law to exclude women is so entrenched that it has gained cultural and social legitimacy, the possibility that such male-dominated *'Baraza la Wazee wa Mtaa*' would approve a woman's excellent understanding of Islamic law is quite minimal.[156] This scenario highlights Waheeda Amien's assertion that women's insubordination in religion fuels their exclusion in informal justice systems and their exclusion from informal justice systems entrenches their exclusion in religion.[157]

It must be highlighted that unlike adversarial formal systems, informal justice systems are crucial in restoring relationships within the community system and ensuring the continuity of symbiotic relationships which are central to the well-being of the members.[158] Thus instead of selecting, promoting or changing the formal or informal justice systems, scholars need to embrace processes of social change as the means for instituting legal empowerment.[159] This way they can understand informal justice systems, not from their personal understanding of social reality and human rights but from the point of view of the women.[160]

As opined by Abu Lughod and other scholars, the differences in understanding what constitutes well-being for an individual often implies that each one will consider justice differently. Since

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[151] Ibid 10
[152] Ibid 11
[153] Agnes Meroka, 'A Feminist Critique of Land, Politics and Law in Kenya' (University of Warwick PhD thesis 2013) 25
[154] Ibid
[155] For such an argument see Shaheen Ali, 'Authority and Authenticity. Sharia Councils, Muslim Women's Rights and the English Courts' (2013) 25 (2) Child & Family Law Quarterly 113
[156] For an argument on how the misinterpretation of Islamic law has been normalised to exclude women, see Lama Abu Odeh, 'Modernizing Muslim Family Law: The Case of Egypt' (2004) 37 Vanderbilt Journal of Transnational Law 1043, 1047, 1146. It has been argued by among others, William Twinning that the above challenges equally exist with regard to state law. For details see William Twinning , ' Normative and Legal Pluralism: A Global Perspective' (Paper delivered during the seventh annual Herbert Bernstein Memorial Lecture in International and Comparative Law Held at Duke University School of Law, April 7, 2009) 483
[157] Waheeda Amien, 'Overcoming the Conflict between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages' (2006) 28 Human Rights Quarterly 729
[158] Ibid
[159] Ibid
[160] For a discussion on how scholars perception of 'the self' and the 'other' affect their analysis of social reality, see Lila Abu-Lughod, 'Writing Against Culture' in Richard Fox (ed), *Recapturing Anthropology: Working in the Present*,(School of American Research Press 1991) 466-467

children's cases end up before informal justice systems through their mothers or other relatives, it is crucial to understand how informal justice systems respond to the 21st-century challenges facing women and children. An examination of how these institutions respond to child abuse among the Kipsigis is one step in this direction. Secondly, children and parents are bound to go for forms of justice and well-being which although emanating from culture, may be inconsistent with the best interest principle, a reality that raises the question of how individual choices that are dangerous to themselves are dealt with (and or) reinforced under informal justice systems. As averred by feminist anthropologists, justice, and all forms of social reality, should be explored from the point of view of the actors (in this case the women who are the subject of justice).[161]

2.8 Summary

This chapter has illustrated the different facets of and the challenges involved in the application of customary law. It has highlighted the historical development of customary law and the different ways through which the colonial and post-colonial experiences have shaped (and continue to shape) customary law. It has also explored the role of customary law in statecraft, the exclusive and inclusive capacities of customary law and the role of customary law and informal justice systems in dispute resolution at the community level. One concern emerging from this chapter is the absence of research on the use of customary law and informal justice systems in children's matters. Thus although there is anecdotal evidence on how girls (as women) have interacted with these systems, the identity of the girls as children has been obscured by the existing studies while the boys have been completely excluded a reality that calls for an empirically grounded analysis of the interaction between informal and formal justice systems. Chapters four to eight of this thesis responds to these concerns by exploring this interaction and examining how it has contributed to the protection of child well-being.

[161] Lila Abu-Lughod, 'Do Muslim Women Really Need Saving? Anthropological reflections on cultural relativism and its others' (2002)104 (3) American Anthropologist 783, 786

CHAPTER 3

(In)adequacy of the (inter)national child rights instruments in child protection

3.1 Introduction

In response to the research question on the suitability of child rights talk in guaranteeing the well-being of the child, the first section of this chapter highlights the mainstream child protection instruments at both national, regional and international level. The second part discusses some of the main criticisms and gaps in the child rights protection system. Within this context, the chapter explores contested scholarship on intersectionality and children rights, the question of rights, duties and ordinary virtues as the foundation of child well-being and the role of customary rights in child protection. The chapter concludes by examining the different ways through which communities generate rights and duties for children and the implication of informal justice systems on the same. Although the question of rights dominates discussions on child well-being at the formal level, it appears, from reviewed scholarship in this chapter, that rights as the foundation of child well-being are highly contested under the informal justice systems and customary law framework for child well-being.

3.2 International and African child protection framework

3.2.1 The UN Convention on the Rights of the Child (UNCRC)

Adopted in 1989, the UNCRC is the most comprehensive international child rights instrument. The Convention lists children rights, provides a mechanism for their enforcement and establishes a reporting structure through the Committee on the Rights of the Child. The development of the instrument not only strengthened the work of UNICEF and UNFPA but also provided an impetus for the UN to consider the interest of children in its programming. Kenya signed and ratified the UNCRC in 1990, the same year it came into force. Although the Convention requires countries to submit periodic reports after every two years, the initial report was only submitted by Kenya in 2000, ten years after signing the Convention. In reviewing the report, the Committee on the Rights of the Child regretted the absence of consolidated legislation for the protection of the child in Kenya[162] It also regretted that the many existing legislations were inconsistent with the spirit and text of the Convention.[163] This criticism eventually led to the development of the Children's Act, 2001 as a unified law on children.

The Convention has been hailed for elevating matters of children rights to the global stage.[164] Accordingly, it lists the rights that every child is entitled to such as opinion, speech, equality, education, religion, health as well as freedom from inhuman and degrading treatment among other rights. The Convention has two optional protocols, namely; the Protocol on the

[162] Committee on the Rights of the Child: Concluding observations on Kenya
[163] Ibid par 11
[164] Alderson Priscilla, 'UN Convention on the Rights of the Child: Some Common Criticisms and Suggested Responses' (2000) 9 (6) Child Abuse Review 439, 442

Involvement of Children in Armed Conflict and the Protocol on the Sale of Children, Child Prostitution and Child Pornography.

The Convention also introduces duties for parents, guardians and other carers and urges state parties to take concrete steps towards the enforcement of children rights. To ensure that states comply with their responsibilities and obligations, the Convention establishes the Committee on the Rights of the Child.

3.2.2 African Charter on the Rights and Welfare of the Child (ACRWC)

The development of the UNCRC provoked ideological differences. African countries specifically felt that the UNCRC reflected the interest of the western child and not the African child.[165] Thus although they were in general agreement with the language of the Convention, African human rights players opined that it ignored issues that were salient to the African child.[166] Accordingly, African governments under the auspice of the then OAU (Organization of African Unity-now AU), developed the ACRWC which sought to address the issues of contention in the UNCRC. These included: The implication of harmful cultural practices on the development of the child; the implication of apartheid and other state-sponsored forms of discrimination on children; and the need to protect the family as a natural environment for the children.

One unique but controversial feature of human rights instruments in Africa is the language of duties.[167] Article 31 of the ACRWC requires children to work for (and for the cohesion of) the family; to serve his/her national community; to preserve and strengthen social and national solidarity; to preserve and strengthen African cultural values; to contribute to the moral well-being of society; to strengthen the independence and the integrity of his/her country and to promote African unity. It is on this basis that Nigeria, Tanzania, Malawi, and South Africa among many other African countries have children rights legislation that expressly list the responsibilities of children.[168] In line with this general trend, Kenya's Children's Act also lists the responsibilities of children.[169]

Although it was adopted in 1990 shortly after the UNCRC, the Charter only came into force in 1999. This delayed enforcement was due to the fact that many African countries felt that signing and ratifying the charter would require them to address the plight of child soldiers who were heavily used in the many civil wars that erupted in the continent upon independence and the prevalent cultural practices that although harmful to children, were deeply rooted.[170] The general feeling among political leaders in Africa was that these two issues were politically

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[165] See Amanda Lloyd, 'A Theoretical Analysis of the Reality of Children's Rights in Africa: An Introduction to the African Charter on the Rights and Welfare of the Child' 11, 12-14

[166] Ibid 13

[167] Ibid

[168] See for instance s 5 of the Malawi Child Care, Protection and Justice Act, 2010, s 19 of the Nigerian Child Rights Act,2003 s 16 of the South African Children's Act 2005 and s 17 of the Tanzania Children's Act, 2011

[169] According to section 21 of the child should:(a) Work for the cohesion of the family;(b) Respect his parents, superiors, and elders at all times and assist them in case of need; (c) Serve his national community by placing his physical and intellectual abilities at its service; (d) Preserve and strengthen social and national solidarity; and (e) Preserve and strengthen the positive cultural values of his community in his relations with other members of that community.

[170] Ibid

explosive and should be phased out progressively to avoid the political damage to their careers.[171] On the other hand, some states felt that most of the issues raised in the charter were similar to those in the UNCRC. It is on this basis that some African countries initially refused to ratify the charter or put reservations that altogether negated the spirit of the ACRWC.[172] Notwithstanding the misgivings, the ACRWC acts to complement the UNCRC and not to replace or rival it. As such states are expected to adhere to their unique reporting obligation under both treaties. Accordingly, the Committee of Experts on the Rights and Welfare of the Child oversees the implementation of the charter.

3.2.3 The Committee on the Rights of the Child and the protection of the best interest principle

The principle of 'best interest of the child' is an important concept in child rights protection. The principle is enshrined in the UNCRC and most regional and domestic child protection legislations across the word. In Kenya, the Constitution, the Children's Act, 2001 and the Basic Education Act, 2013 highlights the centrality of this principle.[173] Article three of the UNCRC states that, 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

The same is repeated in articles 9, 16, 18, 20, 21, 37, 40 of the UNCRC as well as in article 5 of Convention on Elimination of All Forms of Discrimination against Women (CEDAW). By addressing both governments, non-state actors and private players such as parents, the best interest of the child has been said to carry emancipatory capability for children. Although scholars have differed on the underlying principle behind the concept, international law and state law, have attempted to crystallize the concept.[174] The best interest of the child thus implies; child survival, protection, participation, development, identity, autonomy, and freedom.[175] Emphasising these principles, the Committee, in its General Recommendation number 8 of 2006, noted that:

> [I]nterpretation of a child's best interests must be consistent with the whole Convention, including the obligation to protect children from all forms of violence and the requirement to give due weight to the child's views; it cannot be used to justify practices, including corporal punishment and other forms of cruel or

[171] Ibid
[172] These are Democratic Republic of Congo, Morocco, Sahrawi Arab Democratic Republic, Somalia, Sao Tome and Principe, South Sudan and Tunisia. Countries with reservations are Botswana, Egypt, Sudan and Mauritania.
[173] See art 53 of the Constitution of Kenya, s 4 of Children's Act, 2001 and s 58 (h) of the Basic Education Act, 2013
[174] For a an overview of the different scholarly positions, see Andrea Charlow, 'Best Interest of the Child and other Fictions' (1986) 5 (2) Yale Law and Policy Review 267 cf Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights, (1994) 8 International Journal of Family Law 18 cf Julia Halloran Mclaughlin, 'The Fundamental Truth about Best Interests' (2009) 54 Saint Louis University Law Journal 113
[175] Committee on the Rights of the Child, 'General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration.

> degrading punishment and treatment, which conflict with the child's human dignity and right to physical integrity.[176]

Similarly, the Committee in its General Comment number 13 clarified that:

> The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child…. An adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention. It recalls that there is no hierarchy of rights in the Convention; all the rights provided for therein are in the "child's best interests" and no right could be compromised by a negative interpretation of the child's best interests.[177]

As part of its guidelines, it has noted that best interest of the child includes consideration of the child's views, child's identity, preservation of the family environment and maintaining relations, care, protection and safety of the child in situations of vulnerability, the child's right to health and education.[178] Paragraph 32 of the General Comment number 13 further notes that the best interest of the child:

> [S]hould be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation, and needs. For individual decisions, the child's best interests must be assessed and determined in light of the specific circumstances of the particular child. For collective decisions – such as by the legislator –, the best interests of children, in general, must be assessed and determined in light of the circumstances of the particular group and/or children in general.

Despite the attempts to shed more light on the content of the best interest principle, there are still sharp divisions over the nature and foundation of this principle, as well as how this principle should be used to protect children against practices such as corporal punishment. Accordingly questions such as why the best interest of the child? What constitutes the best interest of the child at the grassroots level? Who should protect the best interest of the child and the interphase between the best interest principle and culture as well as the question of whether best interest implies immediate or long term best interest have remained unanswered to date. The following section explores the interaction between the best interest principle and corporal punishment as a basis for a wider discussion on the interrelationship between statutory and customary conceptions of best interest principle under chapter five.

3.2.4 Corporal punishment of the child and the best interest principle

The Committee on the Rights of the Child refers to corporal punishment as:

> [A]ny punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involve hitting ("smacking",

[176] Emphasis added
[177] Par 4 of General comment No. 14
[178] Committee on the Rights of the Child (n 183) art 3, para. 1, Par 52-79

> "slapping", "spanking") children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices).... In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child.[179]

International human rights framework considers corporal punishment to be inconsistent with the best interest of the child and therefore undesirable. Thus articles 28 and 37 of the UNCRC prohibit corporal punishment. Article 19 posits that:

> State parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.[180]

A similar position has been taken by the Committee against Torture which has consistently classified corporal punishment as torture as well as by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights which have observed, based on the Universal Declaration on Human Rights, International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights respectively, that corporal punishment on children is inconsistent with the spirit and letter of the Conventions.[181]

Corporal punishment has also been condemned by African human rights regimes. For instance, the African Commission on Human and Peoples Rights notes that corporal punishment is a form of 'state-sanctioned torture' which violates article 5 of the African Charter on Human and People's Rights that prohibits cruel, inhuman and degrading treatment.[182] Similar sentiments have been expressed by the Committee of Experts on the Rights and Welfare of the Child which has previously urged South Africa to amend its Children's Act to eliminate completely corporal punishment at home and in school.[183] Similarly, in its concluding observation on Mozambique, the Committee urged the state party explicitly to ban corporal punishment in all settings

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[179] Committee on the Rights of the Child, ' General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment', par 11

[180] Art 19 (1)

[181] Since 2009, the Committee has made 79 observations/recommendations on corporal punishment to 65 states with each recommendation emphasizing the tortuous nature of corporal punishment and advocating for its abolition. See for instance ,Committee against Torture 'Concluding observations on Panama', par 48-49

Human Rights Committee, Concluding Observations on the Initial Report of Liberia.' par 42-43

[182] See African Commission on Human and Peoples' Rights, Curtis Francis Doebbler v. Sudan, Communication. No. 236/2000 (2003) par 42

[183] See African Committee of Experts on the Rights and Welfare of the Child Concluding recommendations on the Republic of South Africa- initial report on the status of implementation of the African Charter on the Rights and Welfare of the Child ' par 34/35

including in school, at home, and in alternative care centres.[184] Mozambique was also urged to encourage positive discipline and to support families through awareness-raising and training for those who are working for and with children such as teachers and caregivers.[185] It was noted that such strategies would generally reduce violence against children by systematically reducing and finally eliminating corporal punishment. Such sentiments mirror the latest remedial suggestions under General Recommendation number 5 on State Party obligations under the African Charter on the Rights and Welfare of the Child in which the Committee recommends that:

> Legislation must be adopted to outlaw corporal punishment in all settings, that is, as judicial punishment, in the alternative care system, in schools, and in the home. To this end, constitutional provisions which aim to protect children from all forms of violence whether from public or private sources can be usefully deployed to support such legislation. Furthermore, it must be born in mind that the abolition of corporal punishment in all settings might need sector-specific legislation.[186]

It is clear, from the above discussion, that corporal punishment is largely considered to be a violation of children rights and therefore inconsistent with children rights. Its condemnation by international and regional human rights law has thus fuelled calls for its abolition by child rights activists across the African continent and beyond. However, its firm location in the customs of various countries has made it difficult to eradicate.

The UNCRC and the ACRWC heavily influenced the developed of domestic legislation which were meant to protect children at the national and sub-national level. The following section explores the development of formal child legislations in Kenya and their contribution to child rights protection.

3.3 Development of the domestic child rights protection framework in Kenya

3.3.1 Historical background of child rights legislation in Kenya

The rapid urbanization that characterised the British colonial rule brought with it numerous child-related challenges such as juvenile delinquency and street children. This is because urbanization not only led to breakdown of strong kinship relationships that cared for children but also because it minimised the power of traditional authorities which enforced parental and clan responsibility to children. Children who had moved from villages to towns (with or without their parents) were generally subject to only limited kinship support and authority and often veered off into the streets due to extreme poverty or parental neglect. Accordingly, the colonial government enacted several laws which were meant to address these concerns. It is, however, noteworthy that the legal framework developed to address children matters largely focused on

[184] Committee of Experts on the Rights and Welfare of the Child, 'Concluding Recommendations on the Republic of Mozambique on the status of implementation of the African Charter on the Rights and Welfare of the Child'.
[185] Ibid Par 29
[186] Committee of Experts on the Rights and Welfare of the Child, 'General Comment No 5 on state party Obligations under the African Charter on the Rights and Welfare of the Child and Systems Strengthening For Child Protection' 20

children in towns and were oriented towards freeing the towns of the street and delinquent children.[187]

The colonial children's legislation were generally not tailored to protect the children in towns. Rather they were designed to protect the predominantly European, Asian and elite Africans from the 'menace' of the African children who escaped from rural areas and became street children in the urban areas.[188] It is also noteworthy that these laws were heavily borrowed from England and thus largely reflected the way of life in English cities. Accordingly, they had very little relevance to the concerns of the rural African child. Some of these laws are: Juvenile Act Ordinance, 1934, Prevention of Cruelty and Neglect of Children Ordinance of 1955, (repealed by the children, and Young Person's Act, 1963), the Matrimonial Causes Act, 1941 and the Guardianship of Infants Act, 1959.

The challenges facing rural children, which were often different from the challenges of urban children, were largely ignored in these legislations and programmes.[189] Thus although matters such as female genital mutilation, early marriage, beading of children, access to education, gender preference of male children and disinheritance of children were pertinent challenges facing the rural child, there was no concerted effort to address them either through policy or legislation. The consequence was a big disparity between the socio-economic development of rural and urban children.[190] Customs and customary law thus remained as the only arena through which the plight of rural children could be addressed.

3.3.2 ***Children under the Constitution of Kenya***

The 1963 independence Constitution did not address the status of children. The only constitutional option available for child rights advocates was to argue that because children were human beings, they were subject to the human rights guaranteed under the Bill of Rights (chapter two) of the Independence Constitution. This was however inadequate considering the socio-cultural situation of Kenyan children in which they are considered as generally subordinate to adults. At the same time, since children are not *suis juris,* they do not have any legal standing before the courts and could not therefore directly represent themselves. Since children matters were generally considered to be trivial and due to the inefficiency of the judiciary, most adults did not find the court option as a worthy course, even when it was necessary.

The 2010 Constitution which repealed the independence Constitution has been hailed as one of the most progressive Constitutions in Africa. It not only elaborates on the nature and content of human rights but also has an in-built enforcement mechanism. It entitles everybody (including children) to the rights under chapter four (the bill of rights) and mandates anybody who believes that the Constitution has (or maybe) breached to move to court for redress.[191] For the first time,

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[187] Ruth Sitati, 'Juvenile Delinquency and the Law' in S.B Gutto (ed) ,*Children and the law in Kenya* (Institute For Development Studies University of Nairobi 1979)
[188] Geoffrey Odongo, 'Domestication of International Law Standards on the Rights of the Child with specific Reference to Juvenile Justice in the African Context' (PhD Thesis, University of Western Cape 2005)
[189] Ibid
[190] Ibid
[191] Arts 3 (1), 22, 258

the Constitution establishes the right to culture as an enforceable right for both adults and children.[192] It obligates the state to take necessary measures towards the enforcement of human rights in line with its constitutional and international obligations. Finally, the Constitution reinforces socio-economic rights which are central to the well-being of children and mandates the state to facilitate their progressive realization. Chapter four highlights the rights of special groups including children. Article 53 states that every child has the right to free and compulsory basic education; basic nutrition, shelter and health care; be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour; parental care and protection; not to be detained, except as a measure of last resort and for the shortest appropriate period of time. Within this context, article 53 (2) states that, 'A child's best interests are of paramount importance in every matter concerning the child'. Article 21 (3) of the Constitution mandates public officers and state organs to address the needs of children and other vulnerable groups. This legal provision is buttressed by article 21(4) which requires the state to enact and implement legislation that operationalize its international human rights obligations (including obligations to children) and article 2(6) which considers any Convention or Treaty that is ratified by Kenya to be part and parcel of Kenyan laws. The constitutional protection of children is further emphasised by other statutes, key among them the Children's Act, 2001.

3.3.3 The development of the Children's Act, 2001

The pressure from civil society and international organizations such as UNICEF pushed the government to draft the Children's Bill in 1995. This Bill not only consolidated the many laws on children but also sought to broaden the domain of what constituted children's rights in Kenya. However, on its first submission to parliament, the Bill received a resounding defeat thanks to the advocacy by civil society groups that considered it too weak to protect children.[193] The idea was that 'no child law was better than a bad child law'. As a result of this setback, the government established a broad-based multi-sectoral team to review the Bill, resulting in its redrafting and enactment by parliament in 2001.

Prior to the development of the Children's Act, 2001, children matters were regulated by at least 65 pieces of statutes, regulations, policies and case laws.[194] This wide scope of legislation fundamentally undermined the protection of children rights as most of the legislations were either too weak, vague or contradictory.[195] It was, therefore, a relief to the child rights movement when the UN Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) were developed as they provided a benchmark against which the viability of children's laws in Kenya could be tested. This development not only re-invigorated the expansion of what constituted children rights in Kenya but also acted as an advocacy tool towards the consolidation of the existing legislation.[196]

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[192] Arts 11, 44

[193] Save the Children, *Promoting Child Rights: Reflections on Key Processes of Children Sector in Kenya from 1989 Onwards*, (Save the Children 2012) 31

[194] Geoffrey Odongo, 'Caught between Progress, Stagnation and a Reversal of Some Gains: Reflections on Kenya's Record in Implementing Children's Rights Norms' (2012) 12 African Human Rights Law Journal 112

[195] Ibid

[196] See Save the Children (n 193) 175

3.3.4 Children rights and responsibilities under the Children's Act, 2001

The Children rights granted under the Children's Act reflect those in the UNCRC and the ACRWC. These include; The right to life, fair trial, education, health, parental care, privacy, name, right to live within a family, right to culture and language, right to leisure, play and right to participation in cultural activities. Victims of child abuse and child offenders also have a right to protection, rehabilitation care, recovery and re-integration, right to protection from sexual exploitation and drug abuse as well as the right to religious education. Others are fashioned as freedoms and include freedom from discrimination, freedom from torture, inhuman and degrading treatment including FGM, freedom from child labour and the freedom from capital punishment and life sentence. Section 4(3) of the Act specifically requires the best interest of the child to be factored in any administrative or judicial action concerning the child. Accordingly, government officers under the act are expected to safeguard and promote the rights and welfare of the child.

It is noteworthy that the status of corporal punishment under the Children's Act is largely ambivalent. As opposed to other African countries where the main problem is the legal entrenchment of corporal punishment, the main issue in Kenya is the inconsistency between customary law and state law with regard to the practice. The Constitution of Kenya, as stated earlier, upholds child protection and protects them against all forms of inhuman and degrading treatment including corporal punishment. Similarly, the Children's Act, 2001 and the Basic Education Act, 2013 prohibit corporal punishment at school. However, it has been argued that by granting the parents 'the right to administer reasonable punishment on their children' section 127 of the Children's Act, 2001 essentially allows for corporal punishment by parents.

3.4 Institutions created by the Children's Act for the protection of children

In a bid to fulfill Kenya's international obligations and responsibilities under the UNCRC as well as constitutional obligations to children, the Children's Act establishes a number of institutions to protect and respond to the violation of children's rights. These institutions include:

3.4.1 The Director of Children's Services

The Director of Children Services assists the Department of Children in the establishment, promotion, coordination and supervision of services and facilities designed to advance the well-being of children and their families, supervise children's officers, ensure social programmes are tailored to benefit children, document cases of child abuse, and coordinate the eradication of violence and abuse of children. S/he is also the secretary to the National Council for Children Services. The Director of Children Services also recommends policy initiatives for the protection of children.

3.4.2 *The Children Officers and Children's Coordinators*

Children officers are expected to assist the Director of Children's Services in carrying out his/her responsibilities. There are currently 47 County Children Coordinators (one for every County) and 290 Sub County Children Officers (one for every Sub County). Their roles include; supervising children's institutions within their jurisdictions, overseeing children's programmes,

intervening in cases of child abuse, overseeing the development and signing of parental responsibility agreements, working with the police in the investigation and prosecution of the perpetrators of violence against children and intervening in family disputes that compromise the well-being of children. They are also responsible for the orphans and vulnerable children (OVC) cash transfer programmes, placement of vulnerable children in children homes and doing child assessment reports to assist courts in resolving children's matters.

3.4.3 Area Advisory Councils (AACs)

These are established under section 32 (2) (q) of the Children's Act with the mandate to review the status of children in their jurisdictions and advise the children officers and Director of Children Services on children matters in a specific area. They, not only advice the Directorate of Children Services on the registration of children's institutions but also exercise a supervisory role over the institutions, promote awareness on children's rights and recruit volunteer children officers. Accordingly, there are; county AACs with the county commissioner as the chairman and the county children's coordinator as the secretary. Other members include the county probation officer, county director of education, county health officer and county police commander. There are also the sub-county AACs in charge of sub-counties, locational AACs, and sub-locational AACs. The functions of the locational and sub- locational AACs include; supporting and monitoring service delivery by different government departments, developing referral networks that increase access to essential services by children, establishing child help desks and mobilizing local resources for the benefit of children. The members of the locational and sub locational AACs include; the chiefs, assistant chiefs, religious leaders, community health workers and headteachers from local schools. The locational and sub-locational ACCs are generally based at the community level.[197]

3.4.4 Children's Court

The Children's Courts are established under section 73 of the Children's Act with the mandate to handle offences against children and those of children in conflict with the law. Issues of child custody, maintenance, adoption, and juvenile justice are usually presided over by these courts. Appeals from the Children's Courts often proceed to the High Court. Although the general civil and criminal procedures that apply to other courts apply to the Children's Court as well, the Act empowers the magistrate to limit the number of people who can be present during the hearing of children's matters and to try as much as possible to promote non-custodial sentence for child offenders. Section 76 (3) of the Children's Act requires the magistrate to consider certain factors in determining children's matters. These include; the feelings and wishes of the child ,the child's physical, emotional and educational needs, the likely effect on the child of any change in circumstances, the child's age, sex, religious persuasion and cultural background, any harm the child may have suffered, or is at risk of suffering, the ability of the parent or guardian, to provide for the child, the child's exposure to (or) use of drugs and the customs and practices of the community to which the child belongs.

[197] A village consists of several clans and is headed by a headman. Several villages make up a sub-location. A number of sub-locations make up a location which are then combined to make up a division. Several divisions make up a sub-county. Several sub-counties make up a county which is a devolved unit of administration. Kenya has a total of 47 counties.

3.4.5 Volunteer Children Officers (VCOs)

The Volunteer Children Officers are not mentioned as officers under the Children's Act. Rather they are appointed by the Director of Children Services subject to the recommendation of the Area Advisory Councils. VCOs are citizens who offer their time, skills and resources for the realization of the best interest and rights of children, under the guidance of Children Officer without remuneration.[198] Since they are non-remunerated and are not civil servants, the VCOs lack offices and the necessary resources to carry out their activities and often handle cases directly from their homes. Usually, this means that only community members with some amount of wealth can take up these positions. Their training is often conducted by NGOs.

The promulgation of the new Constitution has had a profound effect on the Children's Act especially the sections that deal with the administration of child rights and adoption. This is because the Act was based on the previous local authorities and provincial structure of administration which have been replaced by the County Governments. As such, calls have been made to re-align the Act with the Constitution and a Bill has been prepared to that effect. Due to the renewed contest between religious organizations, civil society organizations, government, parents and legislators over 'contentious issues' such as adoption, custody, corporal punishment and parental versus state responsibility to children, the Bill has delayed in the Ministry of Labour and Social Services (that is responsible for children matters) for the last three years.[199]

3.4.6 Rehabilitation Schools and Remand Homes

Originally called Approved Schools, under the Children and Young Person's Act of 1963 and the Juvenile Act Ordinance 1934, (now repealed), the rehabilitation schools are established to cater for the needs of delinquent children between the ages of 8-15. Children's Courts, Director of Children Services and the Children Officers have the powers to send children to rehabilitation schools. Although largely owned by the state, the Children's Act envisions privately owned rehabilitation schools but highlights that the cost of maintaining any child in these institutions must be borne by the state.[200]

Section 53 (3) of the Children's Act notes that a child can only be committed to a rehabilitation school up to a maximum of three years and until 18th birthday unless with the express permission of the Children's Court. The rehabilitation schools are usually under the supervision of the Cabinet Secretary concerned. As such s/he may close them if s/he believes that they are failing to meet their obligations. The Children's Act also gives the line Cabinet Secretary power to declare any rehabilitation school as a children's remand home or establish a remand home. On exiting the rehabilitation school, a child is often placed under the supervision of an officer appointed by the children's office for up to 2 years (or 21 years) whichever comes first.

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[198] See http://www.labour.go.ke/social-protection-components/children-services/36-social-security-services.html

[199] Contentious clauses include section 20 of the Bill which prescribes a 5 year imprisonment for those who administer corporal punishment on children and part XII which relocates adoption from the Child Welfare Society (a state and civil society funded (but civil society controlled) organization to the National Adoption Committee under the National government. Similar attempts to introduce the same 'contentious changes' to the current Children's Act, 2001 through the Children Amendment Bill, 2014 collapsed.

[200] S 47 (2)

3.4.7 Borstal institutions

Borstal institutions are established subject to the Borstal Institutions Act, 1963. The Act makes provisions for the establishment of correctional facilities for children. As such they are managed under the Kenya Prisons Services and are often used to hold child offenders who are between the ages 15-18 years. Under section 55 of the Children's Act, a child who is stubborn or a serial absconder from a rehabilitation school may also be sent to a borstal institution. Sections 32-33 of the Borstal Institutions Act mandates the superintendent of the borstal institution to punish children in line with the Act. The stipulated punishments include; removal of penal grades, deprivation of earning and playing games, restricted diet up to three days or confinement in a room for three days. The superintendent may henceforth report such a child to the Commissioner of the Borstal Institution who may re-administer the above punishments, restrict the child's diet for 15 days, withdraw privileges or administer corporal punishment up to a maximum of 10 strokes.[201] However, the Act prohibits corporal punishment on female inmates.[202] Section 36 prescribes the mechanisms and process of administering corporal punishment. Specifically, it states that, 'No sentence of corporal punishment shall be carried out until a period of twenty-four hours has elapsed from the time of the order thereof and a medical officer has certified that the offender is physically fit to undergo the punishment.'[203]

Under section 42, the Commissioner of the Borstal Institution may seek the court's intervention to have a child transferred from the borstal institution to prison if, in his opinion, the child exercises a bad influence on others or engages in gross misconduct. Under section 19, the children in borstal institution should work within the institution subject to the supervision of the borstal officers.

3.4.8 Department of Children Services

The Department of Children Services is responsible for the coordination of all activities concerning children in Kenya as well as for complying with Kenya's obligations under international child rights instruments. The department is also responsible for the provision of care services to children in need of protection and general programmes aimed at fighting child abuse. The Department works with the Directorate of Children Services to supervise children officers, initiate and implement programmes towards the protection of vulnerable children as well as in policy development.

3.5 Other laws and institutions for the protection of children

3.5.1 The Sexual Offences Act, 2006

Enacted in 2006, the Sexual Offences Act was meant to address the prevalence of sexual offences in Kenya. The Act criminalises rape, incest, defilement, and sexual harassment. It also establishes an institutional mechanism for redress and highlights the various punishment for sexual offences. The Act, read together with the Children's Act and the Marriage Act has been

[201] S 33 (5)
[202] S 36 (3)
[203] S 36 (1)

the main statutory instrument for fighting child marriage. Although no study has been done on the implication of this Act on the number of defilement and child marriage cases, experts observe that the number of successful prosecutions has increased since the Act came into force notwithstanding its many limitations.[204]

Although the Act considers sexual activities between an adult and a child as defilement, it does not expressly criminalise or mention consensual sex between children, a reality that has generated calls for its amendment.[205] Noting the difficulty in handling these cases, the High Court has recognised 'the need to consider other measures which are more appropriate and desirable for dealing with children, without having to resort to criminal proceedings.'[206] Accordingly, Justice Ochieng in *C K W v Attorney General & another*[207] challenged stakeholders in child protection to:

> [C]onduct appropriate studies in Kenya, with a view to ascertaining if there were mechanisms and procedures which could be put in place, to offer protection to children whilst simultaneously being proportionate to both the circumstances of the child and the offence.[208]

The key concern has been the difficulty in determining which child had defiled the other[209] in the case of consensual sex between children. This reality has resulted into a disproportionate arrest and prosecution of boys who are presumed to be the defilers, even when the two parties are of equal ages, since the actions of the arresting officers is often based upon the social construction (and assumptions) of masculinity and femininity of boys and girls in which boys are portrayed as aggressive offenders (who deserve punishment) while girls are considered to be timid victims of the oppression and therefore deserving of protection by criminal law. In a related case of consensual defilement between minors, Justice Wakiaga observed that 'Where the offence involves the minors themselves it would be in the best interests of justice for the courts to look at the conduct of the parties including how the complaint is filed so as to protect the boy child too from discrimination.'[210]

Although the state has previously noted that the child whose parents report the defilement case to the police first would be presumed to be the aggrieved party[211], critics argue that such an assumption ignores the doctrine of equality and the nature of criminal offences. Due to the social construction of masculinity, the parents of boys are often unlikely to report cases of defilement a reality that results in further incarceration of more boys for defilement cases. One

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[204] Winnie Kamau, 'Legal Treatment of Consent in Sexual Offences in Kenya' accessed from http://theequalityeffect.org/pdfs/ConsentPaperKenya.pdf on 05 February 2019. For a discussion on the limitations of the Act, see Kiarie Waweru, 'The Sexual Offences Act: Omissions and Ambiguities' accessed from http://kenyalaw.org/kl/index.php?id=1894p%2013 on 5 February 2019

[205] Such calls have been very dominant in court cases. See for instance C K W v Attorney General & another [2014] eKLR , see also P O O (A Minor) v Director of Public Prosecutions & another [2017] eKLR

[206] Ibid par 103

[207] C K W v Attorney General & another [2014] eKLR

[208] Ibid par 104

[209] Such a difficulty confronted Justice Wakiaga in the case below par 23

[210] C M K v Republic [2015] Eklr

[211] CKW vs AG (n 307)

question that this study explores is the ways in which informal justice systems handle such cases and the underlying customary law principles that underpin their decisions.

3.5.2 The Prohibition of Female Genital Mutilation (FGM) Act, 2011

Prior to 2011, performing FGM on children was illegal (subject the Children Act, 2001) but largely legal when performed on adults. The absence of a stiff punishment in the Children's Act coupled with the cultural nature of FGM compromised the ability of state law to address FGM. The Prohibition of FGM Act, therefore, sought to address these concerns. Accordingly, the Act establishes the Anti-FGM Board with the mandate to create awareness on the practice. It also criminalizes undergoing FGM, renting out of facilities for the carrying out of FGM, ridiculing women for not undergoing FGM, undertaking FGM and failing to report FGM cases.

Although the Act extensively addresses matters around FGM, evidence continues to indicate a high prevalence of FGM,[212] resulting into the widely held criticism that by 'over criminalizing' the practice, the law has driven it underground and largely out of reach of law enforcers.

3.6 Summary

One challenge with the international and domestic child rights regime is its presumption on the universality of the best interest principle. It is crucial to examine how in the face of such dominant conceptions, communities, through customary law and informal justice systems create conceptions of best interest and the extent to which such conceptions emancipate children. Similarly, the different ways through which child protection agencies translate the rights language into actionable programmes and policies and the interaction between these translated rights and customary conceptions of childhood is an issue that deserves an insight. As highlighted by the different high court cases in Kenya, addressing children matters through the courts poses a big challenge due to the contextual nature of child-related offences. This reality has activated intense criticism on child rights talk, resulting in a suggestion for the diversion of children from the formal legal system.

The section below endeavours to examine this reality by exploring the different dynamics in child rights realization in view of the obstacles to the language of rights. It provides background for chapters 5-8 which explore the adequacy of child rights talk in child rights realization among the Kipsigis and the role played by Kipsigis families and informal justice systems in rebutting the rights talk in favour of the language of virtues. One additional question that the subsequent chapters seek to explore, and which draws from the next section, is the attitude of the formal and semi-formal justice systems towards the rejection of rights talk under informal justice and the different ways through which they borrow from and work with informal justice systems in the realization of these (or other) interests of children.

[212] Government of Kenya, *Kenya Demographic Health Survey-2014* accessed from https://dhsprogram.com/pubs/pdf/fr308/fr308.pdf 332

3.7 Critique of the international and national child rights frameworks

3.7.1 Introduction

This section provides criticism of rights talk in the promotion of child well-being and responds to the broader question of the adequacy of rights talk in child protection. It identifies the various gaps in the rights language key among them the failure of the rights language to embrace an intersectional perspective, the failure to inculcate ordinary customary virtue in child protection, the dichotomy between ordinary virtues and the language of rights and the different ways through which the two approaches enrich or compromise the well-being of children. This section, therefore, provides a foundation for subsequent chapters which explore the different ways through which the Kipsigis community (de)construct child well-being and the extent to which such a (de)construction is (in)consistent with the best interest principle under customary law. Intersectionality as a method of analysing patterns of oppression and discrimination is introduced below to act as a foundation of the intersectional analysis of child abuse that is conducted later in the thesis.

3.7.2 Children rights and intersectionality

3.7.2.1 What is intersectionality?

There is a general (but contested) argument that the contemporary use of the term intersectionality dates back to Crenshaw's feminist work in 1989.[213] Crenshaw used the concept of intersectionality within the context of critical race theory to highlight how the oppression of black women was a product of many intersecting factors.[214] She argued that black women suffer oppression first as women and secondly as black Americans. These two overlapping identities interact to produce a complex web of marginalization and discrimination that cannot be analysed from a single axis.[215] Crenshaw warns that a linear understanding of discrimination and oppression, in which race and gender are considered as exclusive categories, ignores gendered racial discrimination resulting into lopsided and superficial strategies that only further women's discrimination and oppression.[216]

Intersectionality offers a model for the analysis of other forms of oppression and discrimination such as violence against children.[217] The following section thus explores the arrival of intersectionality in the field of child studies and how the same has renewed perspectives towards gender-disaggregated data in child advocacy. However, despite there being anecdotal evidence on intersectional childhood studies, there is none that is located within customary law. Accordingly, the implication of the intersection of customary law with other factors such as age, childhood, gender, ethnicity and economic status is largely a grey area.

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[213] Brah, Avtar and Phoenix, Ann, 'Ain't I a Woman? Revisiting Intersectionality' (2004) 5 (3) Journal of International Women's Studies 75

[214]See generally Crenshaw, Kimberle, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1(8) University of Chicago Legal Forum 139

[215] Ibid

[216] Ibid

[217] Sumi Cho, Kimberlé Crenshaw & Leslie Mc Call , 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis 2013 (38) 4 Signs: Journal of Women in Culture and Society 785, 793

3.7.2.2 Intersectionality and children rights

One problem with international human and domestic child rights regimes has been the presumption of universal childhood- the assumption that all children are homogenous and that their rights, identity and well-being can be guaranteed by one universal or national instrument. This assumption flies in the face of intersectional child studies which have increasingly demonstrated that children have unique personal, cultural, age, gender and regional identities which affect them differently and interact to either undermine or reinforce their well -being. As Nadan, Spilsbury, and Korbin argue:

> [U]niversal childhood does not necessarily reflect the wide array of cultures and circumstances in which children live, rendering the establishment of such criteria challenging. Creation of standards to promote well-being and freedom from maltreatment applicable to all children requires a firm understanding of culture and context. [218]

Intersectionality, therefore, helps unpack the many assumptions under international and domestic child rights instruments. For instance, apart from the superficial mention of harmful practices in children rights instruments, treaties on children largely ignore the underlying structural concerns of girls.[219] At the same time, children are largely disregarded within the women rights movement and therefore because girls are children, their plight receives only marginal attention. Accordingly, some scholars like Nula Taefu have pointed out that:

> To resolve this predicament, human rights documents must be interpreted in a way that is meaningful for girls….This requires a re-conceptualization of children's rights and women's rights as compatible and complementary. It also involves an integration of girls' fragmented identity by establishing an ongoing dialogue between the women's movement and children's movement. An intersectional approach to girls' rights acknowledges both a gender and age dimension to the concept of girls' best interests and their participation in society.[220]

By failing to appreciate the multiple intersectional layers in which a child exists, the child rights movement has developed strategies that are counter-productive to the well-being of certain categories of children. Other scholars have noted that the character, identity, and rights that accrue to a child depend on his or her society.[221]

Although rights talk ignores the role of a child's socio-cultural environment in the development of his/her identity and the implication of this identity on the child's well-being, available evidence indicates that a child adjusts her/his behaviour to suit the approved patterns of conduct so as to achieve the level of well-being that such conduct confers in his/her community. Such

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[218] Nadan Yochay, Spilsbury James and Jill Corbin,' Culture and Context in Understanding Child Maltreatment: Contributions of Intersectionality and Neighbourhood-based Research' (2015) 41 Child abuse and Neglect 40, 41

[219] Nula Taefu, 'The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child (2009) 17 International Journal of Child Rights 345

[220] Ibid 346

[221] Kristina Anne Bentley, 'Can There be Any Universal Children's Rights?' (2005) 9 (1) The International Journal of Human Rights 107

standards are highly gendered and reflect differently for boys and girls.[222] Accordingly, it is possible for the society to confer a level of well-being that is higher than that of rights or to even withdraw the existing standards of well-being in cases of disapproved social behaviour regardless of what the rights language says.[223] It is in this regard that Ecklund has noted that an intersectional approach is crucial in understanding the identity, salience, oppression and the relationship between children, parents, and caregivers.[224] In explaining the root of child intersectional identity development, she points out that:

> Children learn the value that specific aspects of their culture and identity hold in the variant cultural referent groups in which they are enculturated, even if they do not yet understand the basis for these values... As a result of selective reinforcement within the social context, shared cultural identities develop more rapidly than aspects of the self not valued by those in the primary contextual settings. In turn, the shared cultural identities become identities with which children are more comfortable and confident, resulting in cultural identities with greater salience and more positive valence in specific contexts.[225]

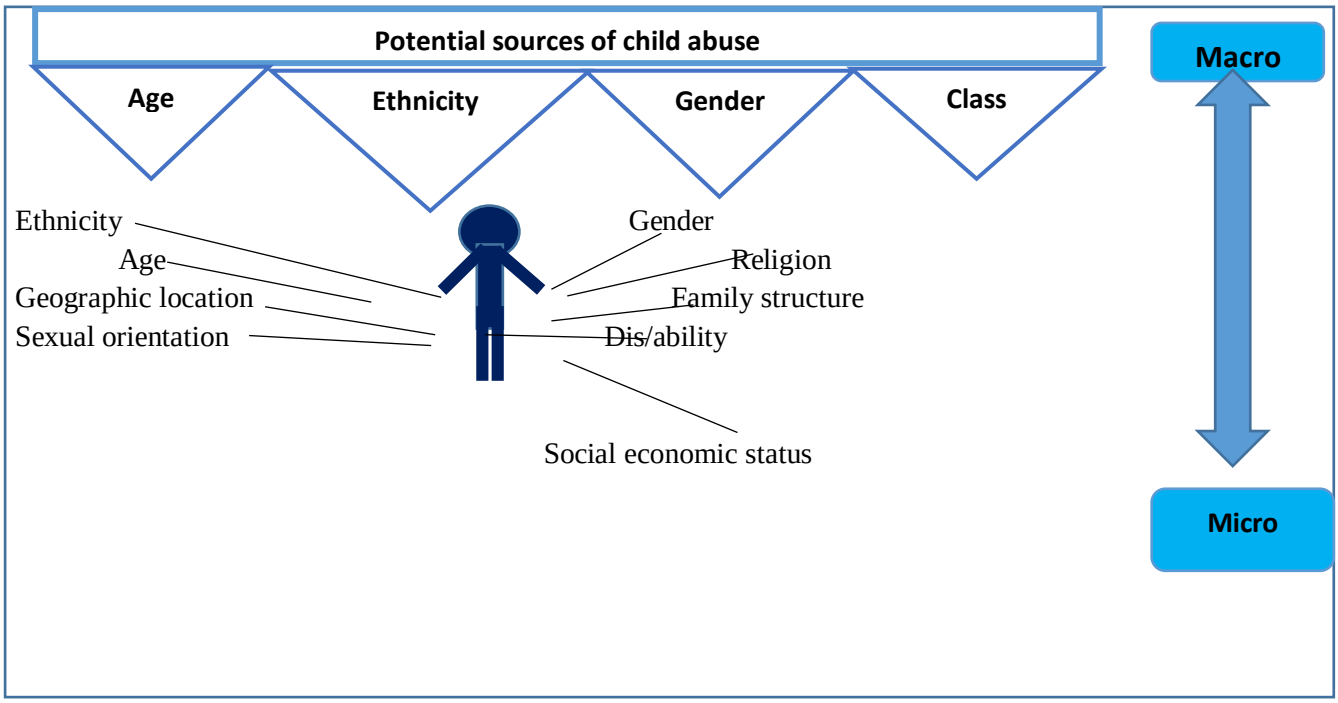
As noted above, child social identity is constructed by those around her. Since this social construction involves grant or denial of certain interests (or rights) within a given culture depending on the society, the difference in socialization between girls, boys, children with disabilities and children of different ethnic groups entitle them to different sets of 'rights' at the community level. The international child rights assumption that all children are holistically passive recipients of protection and potential victims of violations is unintelligible as it ignores the extent to which cultures and socialization processes contribute to differences in well-being between for instance male and female children, babies and teenagers.[226]

Due to social upbringing, children from some social groups may have more privileges than those guaranteed by the rights doctrines to the extent that strict rights enforcement becomes a limitation rather than an instrument for progress. Conversely, the needs of children from disadvantaged social groups or genders may be so aggravated that conferral of rights at the same level with the other children, on the basis of children rights only works to worsen their situation and deepen their oppression.[227] Some children, based on their gender or economic background, may thus need affirmative action or more unique interventions to catch up with the others. The application of ossified rights to all children is therefore counterproductive to their circumstantial interests. Accordingly, child abuse is best understood within the intersectional context in which it occurs.[228] Advancing this view, Nadan, Spilsbury and Korbin have developed the conceptual map under table 2 below to highlight the different intersecting foundations of child abuse. However although they clearly identify gender as a factor in child abuse, their study in its analysis fails to engage with the question of how gender differences

[222] Ibid
[223] Ibid 118
[224] Ecklund, Kathryn, 'Intersectionality of Identity in Children: A Case Study'(2012) 43 (3) Professional Psychology: Research and Practice 256, 262
[225] Ibid 261
[226] Bentley (n 221) 119
[227] Masoud Rajabi-Ardeshiri, 'The Rights of the Child in the Islamic Context: The Challenges of the Local and the Global' (2009) 17 International Journal of Children's Rights 475
[228] Nadan (n 218) 42

among children affect their (mal)treatment and (mis)treatment. Subsequent chapters of this study will explore this dimension.

Table 2. Conceptual representation of an intersectional approach in analysing child abuse



Adapted from Nadan, Spilsbury and Korbin [229]

As observed in the table above, several intersecting factors interact to produce different outcomes for different sets of children. Accordingly, this study examines how geographical differences among the Kipsigis interact with social factors such as poverty, clan and family structure to produce gendered outcomes for boys and girls. At the same time, chapter seven of this thesis explores how poverty interacts with gender, masculinity, and femininity to produce negative outcomes for either boys or girls and how informal justice systems respond to these realities. Since state law by its very nature is often blind to intersecting challenges as discussed by Crenshaw, the extent to which customary law and informal justice systems reinforces and (or) redresses intersecting challenges facing children as a group and girls and boys separately, is unresearched. The study proceeds from the intersectional perspective that since customary law constructs rights and duties for girls and boys differently, the challenges that result from these constructions would also affect them differently.

Having developed an intersectional critique of the rights framework, the next section explores the same concern through the lenses of ordinary virtues and notes that due to its disregard for the socio-cultural construction of well-being, including the role of virtues and care in guaranteeing child rights, rights in and of themselves provide an incomplete framework for child protection.

[229] Ibid 43

3.8 Children rights talk and ordinary virtues

Child rights enthusiasts like Freeman have observed that children rights can be broadly classified into two categories namely; being rights and becoming rights.[230] He explains that being rights are those rights that accrue to children by virtue of their identity as human beings such as civil and political rights while becoming rights are those rights that children need to develop and realize their full potential such as socio-economic rights. He observes that the two sets of rights are interdependent and mutually inclusive and that society should always strive to grant them equally to children.[231]

Although the human rights regime has the long term commitment of improving the well-being of human beings, doubts continue to exist over whether the language of rights, at least as currently structured, can realistically achieve this goal and whether alternative approaches may exist for guaranteeing human well-being.[232] Rights talk may not fully guarantee the well-being of vulnerable populations like children because rights are minimalistic, yet these groups require much more than rights can provide.[233] For instance, rights only guarantee basic food, health, education, and shelter yet children due to their social and biological disadvantage, may require much more than the basic level of fulfillment. Within this context 'rights' may be traded off for a more mild language of claiming social goods or altogether abandoned.[234]

Michael Ignatieff has noted that, the language of rights is elitist and only resonates with state and liberal elites.[235] He observes that ordinary virtues such as love, empathy, tolerance, forgiveness, trust, and resilience are better suited in anchoring the well-being of children (and human beings in general) than the language of rights.[236] Ignatieff's understanding of ordinary virtues resonates with the care ethicists' assertion that care ethics rests on the principle of compassion, love and empathy among other virtues. Accordingly, this study considers care to be an ordinary virtue that grassroots communities such as the Kipsigis give to and expect from each other as an aspect of mutual obligation.

Children's needs such as love, care, compassion and empathy are culture-specific and exist outside the domain of human rights.[237] As Nadan, Spilsbury and Korbin argue, children's well-being can best be realised by appealing to cultural conceptions of morality and well-being rather than rights. They note that moral virtues such as good neighbourliness can do more to protect children than that of rights and law.[238] Rights talk is sometimes unsuitable for members of the family, including children, as the family is held together by mutual trust and not rights and because as noted by Kittrie, the language of rights threatens the very foundation of the family

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[230] Michael Freeman, 'The Value and Values of Children's Rights' in Invernizzi, Antonella and Williams Jane (eds) *The Human rights of Children: From Visions to Implementation* (Ashgate 2011)
[231] Ibid
[232] Kate Schick, 'Beyond Rules: A Critique of the Liberal Human Rights Regime' (2006) 20 (3) International Relations 322
[233] Ibid
[234] See Onora O'Neill, 'Children's Rights and Children's Lives' (1988) 98 (3) Ethics 445, 455
[235] Michael Ignatieff, *The Ordinary Virtues: Moral Order in a Divided World* (Harvard University Press 2017)
[236] Ibid
[237] Ibid
[238] Nadan (n 218) 45

onto which children rights are anchored.[239] At the same time, liberty and autonomy, which act as a foundation for the rights language perceive children to be completely independent of parents and families. A full enforcement of child liberty rights would, therefore, deny children the support from other family members.[240] As noted by O'Neill, full liberty rights can only be conferred to children upon adulthood in which they are normally expected to exit the family umbrella.[241] Even child rights enthusiasts like Alderson have recently admitted that the UNCRC does not grant children the right to love and compassion nor is the same achievable through the language of law or rights.[242] As observed by Simon:

> The emphasis on a child's rights serves to obscure the focus of moral objection to child abuse rather than giving the objection a firm foundation. We should initially focus on the perpetrator and the harm, not on whether the child has had some debatable right violated… rights find their natural home wedded to individuals and only extend to groups with difficulty. Secondly, rights create an unnecessary adversarial relationship among claimants, pitting parent against child. Third, rights discourse operates at a high level of abstraction, often glossing over critical contextual details regarding economic, political, and social factors.[243]

The inadequacy of child rights talk is further demonstrated by the question of access to justice for children. As noted in chapter two, accessing formal justice systems remains a challenge for many adults due to distance, technicalities of the courts and the adversarial nature of the formal justice system which is inconsistent with local conceptions of justice.[244] Insisting on the language of rights, therefore, restricts children to formal justice without considering their lack of access to the same. Their lack of *locus standi* in court by virtue of their age only serves to worsen this reality. In view of these obstacles, it may be prudent to examine how (or whether) children translate rights claims into virtue claims in a bid to fit their claims within the informal justice systems.

In his article titled 'United Nations Convention on Wrongs to the Child' Simon completely rejects the language of children rights, and criticises the UN for the 'misleading' title of the Children's Convention.[245] He observes that child well- being is best promoted by the language of 'protection against harm' rather than that of rights. Such as rephrasing of child well-being opens up room for the participation of a wide variety of stakeholders in child interest protection- and a wide variety of strategies, compared to the limiting language of rights which only bestows responsibilities on a narrowly constituted list of duty bearers. A language of protection against harm, that is anchored on virtues and not rights would confer duties to the neighbours, employers of the child's parents, relatives communities and church members among other people who have regular contact with or capacity to intervene in a case of harm to the child.[246]

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[239] Nicholas Kittrie, 'Family Protection and Human Rights: Complementary Objectives or Collision Course?'(1998) 15 (2) International Journal on World Peace 17
[240] O'Neill (n 234)
[241] Ibid 459, 463
[242] Alderson (n 164) 442
[243] Thomas Simon, 'United Nations Convention on Wrongs to the Child' (2000) 8 The International Journal of Children's Rights 1
[244] For a discussion on the Kipsigis conception of justice see cha 4
[245] Simon (n 243) 10
[246] Ibid 12-13

The extent to which neighbours and families guarantee child well-being is a question that many societies, not least of all the Kenyan society, continue to struggle with. In non-western societies such as the Kipsigis, the state is largely absent with regard to social-economic needs and members of societies often have to rely on community and family members to guarantee their well-being.

Although the family is regarded as a natural environment for the upbringing of children most challenges facing children such as FGM, beading and early marriage all originate from the family.[247] The extent to which the family balances its two identities; on one hand as child protectors, and on the other as violators of child well-being especially in a plural legal context where different sets of family expectations co-exist, such as among the Kipsigis, is addressed in chapters six and seven.

As noted above, strong reasons exist on the role of virtues in guaranteeing child well-being. Virtues are seen as less antagonistic and therefore more in tandem with the dependent nature of children. This thesis, therefore, builds from this foundation to explore how virtues on child protection are enforced especially in plural legal systems like the Kipsigis setting where different sets of virtues and enforcement mechanisms co-exist. One virtue that is important in this regard is that of care ethics. The following section, therefore, attempts to unpack the role of care in the protection of child well-being. It is presumed that such a discussion will respond to the question on the role of care and virtues in child rights protection in view of the criticism against rights at the community level. This section, therefore, provides the basis for a more detailed discussion of findings in chapters seven and eight.

3.9 Rights, ethics of care and child well-being

The question of whether rights are (un)suitable for human, and specifically child well-being has recently attracted the attention of care ethicists. Largely associated with Nodding, Stewart, Held and Tronto among others, the ethics of care proceeds from the assumption that care is necessary to maintain, contain, and repair the world so as to make it a more habitable place for all its members.[248] It is anchored on interdependency, affection, empathy, responsibility mutual trust, a genuine desire to alleviate the suffering of others and protection of the vulnerable.[249] Stewart argues that:

> Society is not made up of separate autonomous individuals who then agree to form relationships, thereby presuming that human interdependence is somehow optional. Rather every person starts out as a child dependent on those providing us care, and we remain interdependent with others in thoroughly fundamental ways throughout our lives.[250]

[247] For an argument on the role of families in child upbringing, see UN General Assembly , *Guidelines for the Alternative Care of Children* (Resolution 64/142, 24 February 2010) section 3 cf Committee on the Rights of the Child, 'Concluding observations on the second periodic report of South Africa' (2016) cf Committee on the Rights of the Child, 'Concluding observations on the Second periodic Report of Sierra Leone '(2016)
[248] Tronto (n 19)
[249] White and Tronto (n 20) 425, 430
[250] Stewart A, *Gender Law and Justice in the Global Market*, (Cambridge University Press 2011) 48

A similar rejection of rights talk at the family and community level has been expressed by Nedelsky who has observed that:

> The ‘‘selves’’ to be protected by rights are seen as essentially separate and not creatures whose interests, needs, and capacities are mutually constitutive. Thus, for example, one of the reasons women have always fit so poorly into the framework of liberal theory is that it becomes obviously awkward to think of women’s relation to their children as essentially one of competing interests to be mediated by rights.[251]

As an analytical framework, care ethics has the same orientation as customary law. Both care ethics and customary law focus on relational thinking and emphasise responsibility towards each other as the basic foundation of personhood.[252]

As noted above, feminist scholarship on care has identified the significant role that the language of care plays in the guarantee of child well-being. However, there is only limited scholarship on the different roles that African culture plays in the construction (and reconstruction) of care, as well as the unique ways in which cultures shape and reflects the moral virtues at the community level especially within the context of care ethics. Part of the reason is that a lot of literature on care ethics is based upon a western cultural context. The implication of culturally-based care ethics, on the well-being of African children and the interaction between this language and the language of rights at the grassroots level largely remains unexplored.[253] This thesis, therefore, fills this gap by exploring how community and customary based moral virtues promote or inhibit the realization of child well-being. The thesis, however, deviates from the feminist perspective of care advanced by scholars like Nel Noddings and locates it within the context of customarily sanctioned ordinary virtues. [254]

3.10 Summary

The first section of this chapter explored the international and domestic child protection framework. It has highlighted the main international, regional and domestic child protection instruments and examined various principles that underpin the instruments such as the best interest principle**.** The second section sought to explore the role of intersectionality in understanding child abuse and protection. It examined how and why by ignoring intersectionality the rights framework fails the test of child protection. The last section

[251] Jennifer Nedelsky, ‘Reconceiving Rights and Constitutionalism’ (2008) 7 Journal of Human Rights 139, 149

[252] See Nodding cited in Kanae Onotani, ‘Considering the Central Ideas of the Ethics of Care in Nel Noddings' Caring: A Feminine Approach to Ethics & Moral Education’ (2012) 6 Journal of Philosophy and Ethics in Health Care and Medicine 98

[253] Ann Stewart has done an analysis of the nexus (or lack of) between care and justice but her focus is on the interaction between the two concepts within the context of international relations. For details see Ann Stewart (n 250) 49

[254] I’m alert to Tronto’s philosophical concerns of whether care is a practice, a kind of judgement, a value system, a branch of moral philosophy or a moral-self-constituting discourse. However this study will consider care as an ordinary moral virtue that can be used to promote human well-being cf, Joan Tronto (n 26) 117

developed a critique of child rights talk through the lenses of ordinary virtues and care ethics and highlighted their role in the protection of human and child well -being.

In view of the above discussion, it is crucial to examine how customary law generates and sustains customary rights and virtues as well as how (and whether) non-rights based language of care is actually utilised at the community level to guarantee the well-being of children. The next chapter, as a precursor to this discussion, uses data from my ethnographic fieldwork to explore the nature, dynamics, procedures and forms of informal justice systems among the Kipsigis. An understanding of how the systems work sheds more light on how they understand child well-being.

CHAPTER 4

4.0 The nature, forms and procedures of informal justice systems among the Kipsigis

4.1 Introduction

In response to my research question on the nature, forms and procedure of informal justice systems among the Kipsigis, part one of this chapter explores the different forms and roles of informal justice systems in the resolution of children matters among the Kipsigis. Key among the forms of informal justice systems explored here include the institution of the chief and assistant chief, *Myoot* council of elders, *Ololmasani* council of elders, *Kokwet* elders, clan and family elders as well as neighbourhood committees.

The above discussion responds to the wider research question of how elders contribute to the protection and or violation of human rights through their interpretation of customary law. As noted in chapter two, customary law is a highly contested, fluid and dynamic form of law so that ossification of customary law often compromises the attainment of human well-being as noted above. Girls and by extension women, therefore, tend to be the biggest victims of ossified customary law due to the interaction between customs (through institutions like the *Myoot*) and modernity which often recreates patterns of exclusion for women and girls, especially in matters of land inheritance. The *Myoot* is a crucial institution in the (re)creation and interpretation of entitlements and rights so that child rights advocates to the extent that they are interested in the protection of the strategic interest of girls, such as on land ownership often have to work with the *Myoot.* As noted in the intersectional analysis in chapter seven, the exclusion of girls often translates into the exclusion of women because the societal attitudes and stereotypes that contribute to the exclusion of women start and childhood.

Part two of this chapter engages in a detailed discussion of the dispute resolution procedures during the elders and chief's sessions and highlights how in a bid to maintain family relations during and after the dispute resolution process, elders and chiefs focus on points of agreement rather than dispute between the parties by listening to the disputing parties alternately. The third part of this chapter explores the nature of (customary) law and justice among the Kipsigis. It examines the semantic, normative and cultural issues around Kipsigis customary law and community justice processes and highlights the role of taboos in the reinforcement of customary law, including in the enforcement of elders and chief's decisions. Part four of this chapter examines the manifestations of inter-systemic forum shopping, intra-systemic forum shopping, vertical and horizontal forum shopping and forum shifting and concludes by observing how the *Myoot* and *Ololmasanani* elders, as dispute forums use dispute resolution on children and other matters, to elevate their political status among the Kipsigis.

4.2 Informal justice systems among the Kipsigis

The Kipsigis dispute resolution platforms range from the *Myoot* to the family elders as diagrammatically represented below.

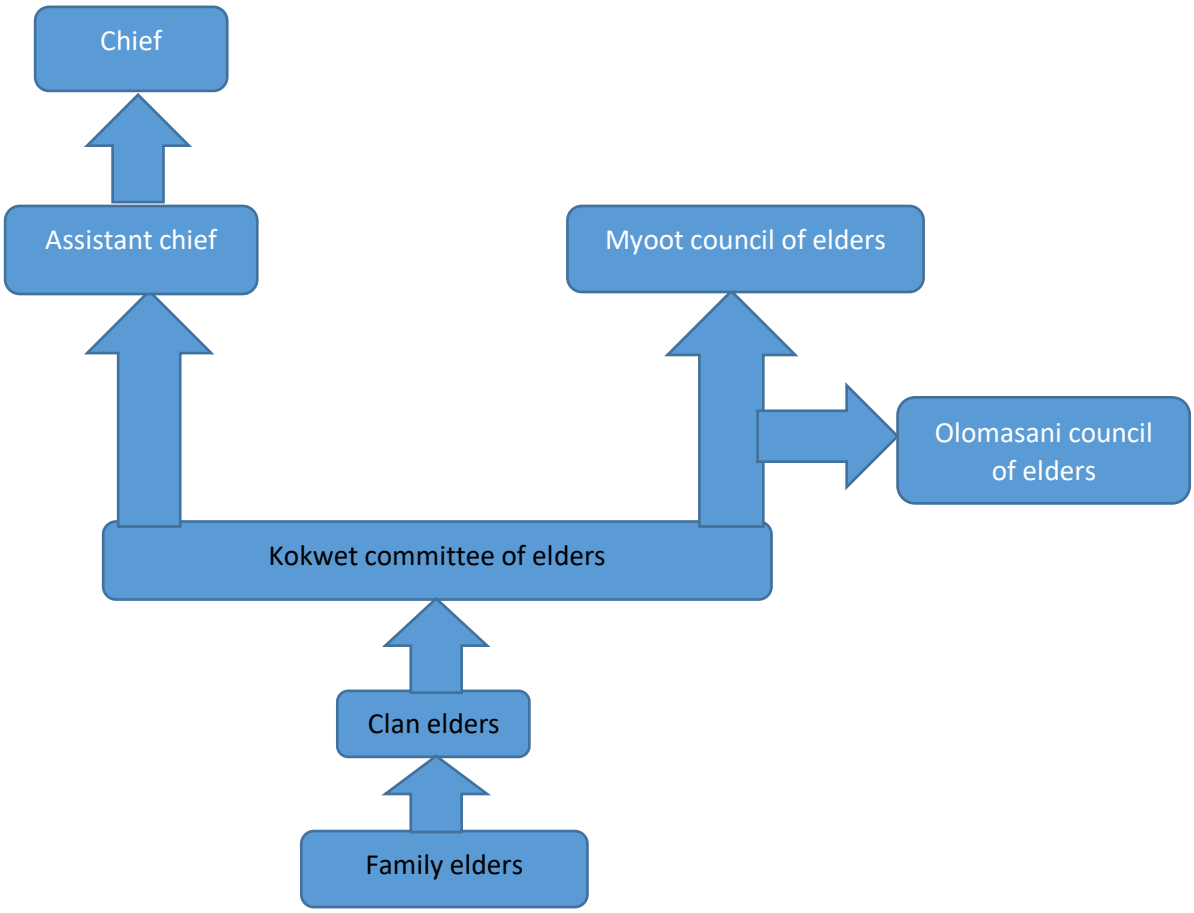

Fig 2. Diagrammatic representation of dispute resolution procedure among the Kipsigis

4.2.1 The chief

The institution of the chief works very closely with that of elders in the resolution of children matters and cross-referral of cases. Consultation between the two institutions characterise informal dispute resolution among the Kipsigis.

The Kipsigis chiefs, just like other chiefs in Kenya are considered as part of the local governance framework. The colonial administration structure, through which Kenya was governed until 2013 when the 2010 Constitution became fully operational consisted of the provincial administration that was organised in a cascading layer. At the very bottom was the village headman who was a community elder selected by the local community in collaboration with the chief (through consensus). To be a village head, the individual had to possess a deep understanding of community customs. The village headman presided (and still presides) over disputes at the community level. All village headmen in a particular sub-location were members of the assistant chief's *barazas* and attended dispute resolution sessions (*kipkaa*). The assistant chief's barazas were (and are still) occasionally attended by members of councils of elders, especially when disputes require a deep understanding of customary law.

Above the headman was the assistant chief who was appointed by the government in consultation with the local community. The assistant chief headed a sub-location and heard appeals from the village headman. Above the assistant chief was the chief who headed a

location. Any disputes that could not be resolved at the chiefs' level were reported to the police or to court. However because the chiefs do not possess judicial powers and are part of the executive, courts had (and still have) original jurisdiction with regard to all matters presented to them, regardless of whether they had been determined by the chief. The chief reported to the District Officer (DO), who was often a non-local and a professional. The District Officer headed the Division and reported to the District Commissioner (DC) who headed a District. The District Commissioner reported to the Provincial Commissioner (PC-who headed a Province). The Provincial Commissioner eventually reported to the president. There were a total of eight provinces which have now been reorganised into eight regions under the Regional Commissioners.

The 2010 Constitution abolished the provincial administration system and established 47 devolved counties each headed by a governor. It obligated the government to restructure the previous system of administration in line with the devolved system of government and the new constitution. Although this requirement led to the abolition of the offices of the DO, DC, PC and the establishment of the offices of the Regional Commissioner, County Commissioners, Deputy County Commissioner, and the Assistant County Commissioners, the office of the chief has been untouched. This is because other than the chief, the rest of the provincial administration was never created by an Act of Parliament or any law. Rather it was a product of British re-organization of the colonial administration. It specifically resulted from the colonial re-organization in 1929 which saw the creation of 10 provinces, two of which were abolished by the independence government in 1963.

The offices of the chief and assistant chief were established through the Chiefs Act, 1937 and did not undergo any change upon the coming into force of the new Constitution in 2010 because, the Chief's Act, 1937 has never been repealed and remains in force to date. Under the Chiefs Act, 1937 and the National Government Coordination Act, 2013 the chief has powers relating to, control of illicit brews, health, security, environmental conservation and distribution of relief and emergency services. Thus, although chiefs spend most of their time resolving disputes and administering justice at the community level, this is not anchored in the legal frameworks that establish their offices but on social and community acceptance.

Jurisdictionally, the chief (*Kirwokindet*) presides over a location while the *Rubeiywot Kirwokindet* (assistant chief) presides over a sub-location. One location consists of several sub-locations with the number determined by the population and size. The assistant chiefs receive cases from the *Kokwet* elders in two forms; either a dissatisfied member of the community will file the case with him/her as a form of appeal or the case will be referred by the elders. Usually, in referring the case, the elders can physically visit the assistant chief's office and report the matter or write a report and attach the minutes of the proceedings. Upon receiving the verbal or written appeal, the assistant chief convenes a dispute resolution session. If the matter concerns land, cattle theft or has more than two parties, the assistant chief convenes a *baraza* where all members of the community are invited to participate. For land matters, the *baraza* has to be held on the contested land. However if the dispute involves only two parties such as children matters, the session takes place in the assistant chief's office. It is important to note that even when the session is held in the Assistant chief's office, community members are usually free to attend and contribute to the process, either by listening or as witnesses.

Fig 3 Dispute resolution sessions at the Chief's office in Kapsosian.

Fig. 4 The sticks *(mukwajit)* are carried by Elders and the Chief to denote status or authority

Members who are dissatisfied with the decisions of the assistant chief are usually free to seek an audience with the chief. Members who are dissatisfied with the decision of the chief usually proceed to the Assistant County Commissioner, court or children officer. The dispute resolution process at the chief and assistant chief's office are largely similar. Because children matters are considered as generally trivial, they rarely proceed beyond the chief's office. Even when they do, they proceed to the Children officer rather than the Assistant County Commissioner unless the matter evolves into an inter-clan or inter-communal dispute such as cases of children engaging in cattle rustling or drug trafficking.

4.2.2 Myoot council of elders

The *Myoot* council of elders is the highest cultural organization among the Kalenjin. Registered as a cultural association by the state, the group has representatives from all the Kalenjin sub-tribes. Their roles are largely communal. To this end, they are involved in anointing political leaders, inter-clan/inter-communal peace-making and environmental conservation initiatives especially those that relate to the destruction of community forests. As a registered organization, the council comprises of chairman, vice-chairman, secretary, organizing secretary, and treasurer. The *Myoot* has branches in all the regions inhabited by the Kalenjin. There are branches in Bomet Kericho and Narok among other branches.

Members of the *Kalenjin Myoot Council* among the Kipsigis also double up as members of the Kipsigis Council of Elders although not all members of the Kipsigis council of elders belong to the *Myoot*. Each regional branch of the *Myoot* has a leadership structure that mirrors that of the mother institution. Each member is given a badge for easy identification in the community as illustrated below.

Fig 5 Name tags and badges of a *Myoot* elder

Due to their influence among the Kalenjin, the *Myoot* are often sought after by political players during electoral seasons, a reality that has sometimes brought sharp divisions among the members. Their meeting sessions start with the citation of traditional Kalenjin prayers in which all the members take part simultaneously.

The *Myoot* are often sought to interpret customs in matters of taboo or to give advice *(kotigonet)*. However, due to their revered positions, their roles are often advisory. Their advice can then be implemented by village elders or specific members of society who sought the advice. Some members of the *Myoot* also sit in *Kokwet* committees of elders within their various villages. Due to their position, they are usually held in high status when they sit with the *Kokwet* and often chair their meetings. Unlike the *Kokwet* who have to preside over cases within their

villages (unless specially invited due to their possession of unique traits such as the ability to curse or bless), members of the *Myoot* are considered to have jurisdiction throughout the Kipsigis and wider Kalenjin land. Accordingly, they can be invited among the Kipsigis as well as among the various sub-tribes of the Kalenjin community to resolve or pronounce themselves on pertinent matters. They are also responsible for conducting any ceremony that may be ordered upon the resolution of a dispute.

The *Myoot* council of elders gives the position of the community with regard to different socio-cultural, governance and environmental issues. For instance in *Luo Council of Elders & 7 others v Cabinet Secretary Water & Irrigation & 13 others*, the Kipsigis council of elders (under the banner of the Rift Valley Council of Elders) joined seven other councils of elders to oppose a government plan to build Itare Dam which would divert water from up to five rivers flowing through Bomet, Kericho and other parts of Western Kenya to meet the growing water demands of Nakuru County. In his sworn affidavit, Mr. Kimetto, the Secretary-General of the Kipsigis council of elders observed that the diversion of water from the rivers in Kericho and Bomet would impoverish the local Kipsigis community. Although the case is ongoing, it has raised a lot of debate over the role of elders within their community. On one hand, the state has insisted that elders should not play any role in development matters but should strictly focus on cultural matters while the elders insist that their role goes beyond acting as custodians of culture to the protection of community interests.

Similarly, *Myoot* elders often give their positions on matters that they consider to be an affront on their community and its customary law. For instance, the *Myoot* vehemently condemned the verdict in *Joshua Kiprono Cheruiyot v Rachel Cherotich Korir* where the High Court, sitting in Kericho, allowed three women to inherit their father's land against the wishes of their brothers and clan. As part of their evidence, the brothers submitted minutes from the meeting of the clan elders in which the clan had observed that:

> [G]irls have no clans till they are married, have no right to inherit property from parents once they are married, and it would be, under Kipsigis culture, a trespass for the daughters and (their) children to be on the land...No land would be allocated to the married daughters or sisters as their land is in their individual matrimonial homes, in accordance with Kipsigis culture.

In their submissions, the brothers also observed that Rachel, the respondent, had been given land by their father to cultivate maize. However, when her father's cattle unintentionally trespassed into her farm, she called the police who arrested her brothers. This was considered as disrespectful and a curse was consequently placed upon her. Accordingly, the brothers wanted her to exit the land since although she had been given the land, the title had not been transferred to her by their father. The judge, however, dismissed the position of the clan and the brothers and argued that both article 27 of the Constitution, 2010 and the Land Act, 2012 prohibited discrimination in land inheritance. Accordingly, the judge ordered that the estate be distributed equally to both the sons and daughters. This decision irked the *Myoot* council of elders who called a series of press conferences to condemn it for setting a bad precedent and violating the custom of the community. The elders noted that:

> [F]or women who have been married off under Kipsigis customary law and had dowry paid to come back home and claim property, they invite a curse upon their

> children...Once married they will now be advancing developments of the clans that they are married to and will not be allowed to rob their father's clan.

Other elders admitted that an unmarried woman could be given land under customary law but that the same cannot be equal to that of the brothers. Similar rights exist for divorced women. Since Rachel lived on the land that her father gave to her before she was married (and from which her brothers wanted her evicted) it appears that the position of the elders and the judge were not as variant as reported. The dispute between the judge and this set of elders, therefore, seems to be in the fact that the judge distributed the land equally, rather than that she gave land to the women.

Community resistance to women's land rights, coupled with entrenched discriminative elements of customary law explains why despite the existence of robust land laws that emphasize equality in land inheritance, women still lag behind in land ownership. Since the Kipsigis allocate land to its members at childhood, the exclusion of women from land ownership is a direct product of the exclusion of girls from land ownership which as noted by the *Myoot* in the above case, seems to emerge from culture.

The above discussion responds to the wider research question of how elders contribute to the protection and or violation of human rights through their interpretation of customary law. As noted in chapter two, customary law is a highly contested, fluid and dynamic form of law so that ossification of customary law often compromises the attainment of human well-being as noted above. Girls and by extension women, therefore, tend to be the biggest victims of ossified customary law due to the interaction between customs (through institutions like the *Myoot*) and modernity which often recreates patterns of exclusion for women and girls, especially in matters of land inheritance.

Accordingly, it must be noted that the *Myoot* is a crucial institution in the (re)creation and interpretation of entitlements and rights so that child rights advocates to the extent that they are interested in the protection of the strategic interest of girls, such as on land ownership often have to work with the *Myoot.* As noted in the intersectional analysis in chapter seven, the exclusion of girls often translates into the exclusion of women.

4.2.3 Ololmasani council of elders

Operating in Emurua Dikkir sub-county, the Ololmasani council of elders is a registered cultural organization. The members are selected from within Ololmasani Division-Narok County. They have a hall in a shrine where the elders meet every Saturday afternoon.

Fig 6 *Ololmasani* elders walking to their meeting point at Olchobosei hills

Their roles include praying for rain, inter and intra-communal peace and against disease outbreaks. They are often invited to pronounce curses on members of the community who are found to have engaged in taboos or repeatedly refuse to adhere to the elders' directives. They intervene in cases of cattle rustling between the Kipsigis and the Maasai, especially if the same results in inter-communal conflicts. The elders also participate in cleansing ceremonies, such as cleansing of murderers as well as in blessing political aspirants and other prominent or successful achievers of the community.

Usually, before their sessions, the elders engage in a Kipsigis traditional prayer. During their meetings, the 'younger elders' sit on the floor while the older ones sit on the chairs. Each elder then briefs his colleagues about the occurrences or problems in his area. Members of the community who need advice on specific customary issues usually visit the shrine during the Saturday sessions to seek their opinion. Similarly, chiefs and *Kokwet* elders who require additional information (*kotigonet*) to resolve a case usually visit the shrine. The person seeking advice would first narrate the case in question and receive the opinions of the various elders present. The chairman will then summarize all the ideas and proclaim the overall point of consensus which is then considered as the *kotigonet* of the council. The council also serves as the last point of appeal for aggrieved parties who believe that the lower levels of dispute resolution have grossly misinterpreted customary law. However, these are rare as the council seldom gives audience to disputing parties except in cases where they strongly believe that the case at hand is big enough to threaten the well-being of the community or clan. Children matters, unless they have a dimension of taboo or curses, are therefore considered to be too trivial for the council. To this end, the council only gives *kotigonet* on how such cases are to be handled but rarely handle them.

As a registered cultural organization, the group has a secretary, chairman, and vice-chairman. Membership is purely based on age, respect in the community and wisdom. In line with Kipsigis culture, the council is composed of members from different clans each with a specific role. For

instance: elders from the *Kibasisek* clan are responsible for pronouncing blessings while the *Kapcheboin* clan (also called *Cheboin*) clan are responsible for curses. The *Kitolek* clan would traditionally be expected to lead during war. Elders from the *Kipsamae* clan officiate during cleansing ceremonies and may also conduct blessing ceremonies in the absence of a *Kibasisek*. Although elderly chiefs may attend the functions of *Ololmasani* elders (as elders not as chiefs), they cannot participate in the blessings or cursing ceremonies as they are considered to be the face of government. No woman sits in the council.

Although blessing, cursing or cleansing must be done by elders from the appropriate clans, decisions over the same are made by the whole council. Thus before curses are pronounced upon an individual, the case must be thoroughly investigated and heard. Usually, the case proceeds from the family elders to the clan elders, Kokwet elders, to the assistant chief, chief, and finally to the *Ololmasani* elders. The *Ololmasani* elders only intervene if the dispute exhibits a customary dimension or taboo, for instance, assaulting a parent.

4.2.4 Kokwet 'committee' of elders

The *Kokwet* elders exist at the village level. *Kokwet* is not registered and as such, there is no permanent list of membership. Since the *Kokwet* is ad hoc with no permanent membership or meeting venue, the study considers the term 'committee of elders' instead of 'council of elders' as appropriate in referencing the Kokwet elders. An older person is not necessarily an elder and as such, individuals who are old in age but are considered unwise, or unmarried could be by-passed for a younger person who is considered as wise. Elderliness is therefore socially constructed while old age is considered to be biological.

When a dispute arises, the *Boisiekab Kokwet* (village headman) invites elders to preside over the matter. Usually, the call up is based upon availability, 'wisdom' and experience. Sometimes when curses, blessing or cleansing is needed, the headman makes a deliberate attempt to invite elders from the clans responsible for curses or blessings as discussed earlier. Usually, the elders hold *kipkaa* (an informal dispute resolution session) either under a tree in a community field, at the homestead of the disputants or within the headman's compound. Their dispute resolution procedures are largely informal although the fieldwork found out that in some cases, especially in the more 'developed' parts such as Kericho, written minutes of the sessions are sent to the chief in cases of appeal.

The research found out that the *Myoot* council of elders had female representatives. However, the *Kokwet* and *Ololmasani* councils of elders generally had no female representation. However, despite the fact that women were not members of the *Kokwet*, they could participate in the proceedings as listeners, witnesses or as specially incorporated members during the determination of women-specific cases. Elderly women could, therefore, be invited to the *Kokwet* meetings in instances where either both parties to the dispute were women or where a woman was accused of doing something that was considered a taboo. For instance, in one of the cases decided by the *Kokwet* elders in Emurua Dikkir two women were accused of fighting in public over their political differences. As supporters of different political parties, namely KANU and Jubilee, they had constantly accused each other of mudslinging. In the process of the fighting, one of the women tore the clothes of the other, exposing her body. Since this happened in public and therefore in the presence of their children and other relatives, it was

decided that the woman whose clothes had been torn must undergo cleansing to avoid bringing bad omen to the children. Such a cleansing was to be done by an old woman who attended the *kipkaa*. Not all *Kokwet* gatherings involved dispute resolution. In some instances, the members met to share ideas on specific customary issues, respond to a new government policy initiative or meet government officials such as an assistant county commissioner.

Fig 7: *Kokwet* elders meeting to discuss emerging issues in the community

4.2.5 Family and clan elders

This is the most basic unit of dispute resolution among the Kipsigis. Because Kipsigis families are generally large, family elders constituted a crucial dispute resolution arena. Once a dispute emerged, the parties reported the matter to the eldest member of the family. This elder was usually obligated to convene a session with three or more other elders. Such sessions take place at the homestead of the conflicting parties and are largely reconciliatory. Although there was a focus on truth, the emphasis was on forgiveness and familial harmony. Usually, no records were kept. Individuals who feel dissatisfied by the decision of elders at this level would report to the clan elders. Specifically, the case is reported to the eldest man in the clan who then convenes a meeting with a group of selected elders to listen to the dispute. However, a case reported to any other elder within the clan would have to be reported to the eldest man before the dispute resolution session can start. Convening such a session without the intervention of the eldest man was considered as disrespectful. However, if the eldest man was sick, drunk or mentally incapacitated the process could go on without him.

Since most of the disputes reported at this level were marital disputes, elderly women played a crucial role in the resolution of the disputes. Whenever the elders felt that the wife was responsible for the marital dispute, they would second one of the female elders to mentor her. She would not only be expected to continuously 'advise' her but also to report to the elders about the progress of family reconciliation. However, no corresponding action was done in

cases where the fault was on the man, indicating the gender inequality that is inherent in the dispute resolution at the clan level.

Thus, although the female elders played a crucial role at the family and clan dispute resolution level, they were completely missing in the *Kokwet* and *Olomasani* Councils, but largely passive at the Myoot level.

4.2.6 Neighbourhood committees

Two categories of neighbourhood committees were observed in this research. The *Nyumba Kumi* initiative and the neighbourhood committees in tea plantations. The *Nyumba Kumi* (10 households) programme is a state-led programme which seeks to encourage members of any given community to be well conversant with and interact with at least 10 households in the community. *Nyumba Kumi* sprung up as a form of community policing and counter-terrorism measure by the government under the Ministry of Interior in which communities were encouraged to engage with strangers in the community and to report their illegal actions to the police or chief. The *Nyumba Kumi* initiative is led by a National Taskforce on Community Policing. Each sub-location has a *Nyumba Kumi* committee and elects its chairman who would serve for two years. The sub-locational *Nyumba Kumi* committees translate to the locational Nyumba Kumi committee and finally to the county Nyumba Kumi committees. Each committee consists of 15 members elected by the community.

One challenge that has hindered their operation is the fact that the membership is prescribed by the state, a prescription which does not fit within the Kipsigis community-led power structure. Thus although the state requires the membership of the youth, religious leaders and businessmen in the committees, community members do not associate them with 'wisdom' and are thus less likely to consider them as dispute resolution or reporting platforms. A second challenge relates to their formal structure, including the fact that they have a constitution and a procedure of conducting their sessions. These formalities generally make them repulsive to many community members seeking justice. Accordingly, they are less active in Kericho and Bomet counties but quite active in Emurua Dikkir where they are highly involved in the prevention and response to cattle rustling between the Maasai, the Kipsigis and the Kisii.

Although established on a security platform, *Nyumba Kumi* has evolved to deal with general matters of peace and inter-communal harmony. However because their sessions are widely spaced and due to their existence at the boundary of the formal and informal, and association with the security and national administration agencies, they were not very popular with regards to dispute resolution. Their disregard for customary law and customary leadership structures in favour of state law and presumed national uniformity equally compromised their operations. The fact that the members of the committee are elected is equally problematic by customary standards because, under customary law, the authority to intervene in disputes emerges from one's status in the community a reality which explains why elders and chiefs are comparatively popular in dispute resolution notwithstanding the fact that they are not elected.

The second category of neighbourhood committees exists in the tea estates which are basically small communities of tea plantation workers who live and work within the multinational tea

plantations.[255] Because the plantation workers are multi-ethnic, these Committees consist of individuals from different ethnic backgrounds who are involved in dispute resolution among the workers. Accordingly, they do not use Kipsigis customary law but rely on general principles of customary and human moralities that exist across the spectrum of Kenyan communities, such as the principle of *utu* and good neighbourliness as well as elements of state law and general human moralities. Their existence is further justified by the fact that the multinational tea companies are often uncomfortable with external interference into the activities of the tea estates and plantations and the committees are therefore an in-built means to contain interpersonal conflicts within the estates and therefore within the purview of the multinationals. Part of the reason for this approach is the postcolonial resentment against the multinational tea companies in which locals who were displaced from the land that was given by the colonial regime to the tea companies continue to demand their land and (or) compensation. Quite a number of their descendants have remained as squatters to date.

Due to the fact that the Nyumba Kumi and Neighbourhood Committees do not use customary law, neither do they have customary structures the study did not extensively engage with them.

4.3 Dispute resolution procedure among customary informal justice systems

4.3.1 Procedure during the elder's kipkaa sessions

It is important to clarify that the chief, assistant chief, and *Olomasani* elders have fixed places where they converge to resolve cases. However, depending on the nature of the dispute, the chief could have the dispute resolution in the form of a *baraza*. Other forms of IJS are generally more flexible and could meet under a tree in a designated community land, at one of the elder's homes or in the homes of one of the disputing parties. In most cases, children cases were resolved within their home.

The dispute resolution process is a system process that starts from the family elders to the chief. Each higher dispute resolution structure acts as an appeal system for the lower one. Upon receiving a complaint the chiefs/elders would record the details and schedule a dispute resolution session *(kipkaa)*. On average the schedule would be two days after the conflict is reported. However, if the parties were close to the chief's office and the availability of both parties was guaranteed, the cases could be reported and heard on the same day.

Among the more conservative Kipsigis such as those from Sigor and Chepalungu in Bomet County and Emurua Dikkir in Narok County, the dispute resolution sessions started with a traditional Kipsigis swearing, in which the disputants would promise to say the truth. The elders would then proceed to pronounce generational curses upon anybody who would say a lie or hide the truth. However, in the areas of Kericho and the rest of Bomet County, the dispute resolution sessions started with Christian prayers by one of the elders. After the prayer, the convenor of the session, usually the village headman *(Boisiekab Kokwet)* or oldest elder would explain the purpose of the session and the number of cases that would be addressed that day. Since no time is usually allocated to the process, the cases are dealt with on a case by case basis

[255] The multinational tea plantations predominantly exist in Kericho and Bomet highlands where they collectively own approximately 800,000 acres of tea. The main companies are Unilever Tea, Williamson Tea and James Finlay.

provided that they had been scheduled on the same day. Although the session is often convened by the village headman, his influence on the case, especially when other older elders are present was found to be limited.

The weight attached to a given opinion by an elder was largely dependent on his age and status in the community. Disagreements were most pronounced in cases where the 'modern' interpretation of customary law clashed with the classical interpretation of the same such as cases where men disinherited children from the first marriage upon marrying the second wife especially in instances where the first wife rejected the second marriage and went back to her parents' home. Notwithstanding this reality, decisions were generally based on consensus. Attempts were often made to convince reluctant elders over the correctness of a specific position as it was believed that the dispute resolution process should not in itself result in animosity between the elders. Thus one case would usher in a discussion among the others of the different possible customary outcomes in the case and the possible options that would suffice if specific variables or facts under consideration were to be different. Such discussions were often led by the oldest elder.

> For instance, in one case witnessed in Mogondo Location-Emurua Dikkir, a woman was said to have separated from her husband about 20 years ago with her two sons upon the marriage of the second wife. Since there was no official customary divorce, some of the elders felt that the woman could come back to her home together with her children. However, others noted that since she left before her bride price was paid, she could not be the first wife as the bride price of the second wife had fully been paid while she was away and therefore the second wife essentially assumed the position of first wife. Still, others felt that although her two children had an indisputable right of return, she did not have a similar right. On the other hand, it was noted that the decision of the husband to demolish her house before an official customary divorce is done was a taboo that required cleansing. Although the headman and two other elders insisted that all that was needed was to rebuild the house as there was no official divorce, majority of the elders noted that since the woman had had two additional children while she was away and had now returned with them, the fate of the four children could not be determined together as the two born outside wedlock had a different set of identities. This posed a challenge to her resettlement. Eventually, the elders agreed by consensus to have the man re-allocate land to the two sons and have a cleansing ceremony conducted on the location of her former homestead. The two children born out of wedlock were to return to their maternal grandmother and only return to their parents upon the reconstruction of their mother's home. At the same time, the two children born outside wedlock would not be given any land although one of them was a girl and would not have been given any land anyway. For the boy born out wedlock to qualify for land, he would have to be considered as a son of the man but this would require his biological father to give some form of compensation to the adoptive father. Since his identity was unknown and the woman was unwilling to disclose the same, the elders noted that he could not be entitled to ancestral land.

As highlighted in this case, the elders attached different weights to the various facets of the same case, a reality which accounted for the difference in customary law interpretation. During a dispute resolution process, the complainant would be asked to restate his/her case. Elders and members of the society are usually allowed to interject and seek clarification over issues that

are unclear or contradictory. The complainant would then be asked to sit and the respondent would be asked to respond. After the response, both parties would be asked to leave. The elders present would then discuss the issues raised with witnesses and other members of the society. Any member of society with information concerning the dispute would be encouraged to make a contribution. The first to contribute would be the closest relatives. After presenting their statements, they would also be asked to leave and the process would be repeated until only distant community members and elders remain in the room. Many of the community members who rose up to speak narrated their past encounters with similar disputes and the decisions that were made by the elders in these disputes. Sometimes proceedings would be interrupted and elders who had made landmark 'precedents' could be called in to help unlock a stalemate among the elders present. In other instances, the whole process could be aborted or suspended by the emergence of a more urgent case that required immediate attention.

In some instances, customary law does not have very explicit answers and the sessions would be interrupted several times to have more experienced elders invited.

> For instance, in one of the cases in Sigor, Chepkoech, a young mother, had failed to disclose the fact that she had a child when she got married. Although she lived together with her husband, Chepkoech had left the child with her mother and would often go home to visit her. However, when her mother died, she opted to bring up the child to her family but the husband rejected the child on the basis that he was not informed before. He, therefore, asked Chepkoech to either return the child to the biological father or he would have to divorce her. The case proceeded for a better part of the day with each party being asked intermittently to leave the *kipkaa* session for the elders to discuss. Kipsigis customary law expects a man to readily accept a child born outside wedlock during the subsistence of the marriage (subject to the biological father paying a given number of bulls). The status of the child who had been born before the marriage was however much more contested. One set of elders noted that to the extent that his existence was disclosed at the time of the marriage he could be considered as the biological child of the man because he would be used to referring to the man as his father. However if he was brought in at a much older age, referring to the man as his father was difficult and according to the elders, such a child would resist the control of the adoptive father, even if he was accepted in. Another set of elders was of the opinion that the non- disclosure during marriage does not materially affect the status of the child. Still, one elder observed that because the family already had three children, allowing this child into the family would interfere with the firstborn who was already entitled to certain rights and obligations under customary law. The fact that he was a boy only worsened the problem as it introduced inheritance question which would otherwise not surface if she was a girl. Additionally, it was argued that because he was being introduced late into the family, the other children would reject him. Eventually, it was decided that the *kipkaa* session would be suspended to allow for the invitation of more 'experienced elders' (in this case a *Myoot* elder) to avoid making decisions that would result into a bad omen for the family.

The justification for asking the parties to leave intermittently during the *kipkaa* sessions was basically to avoid worsening the conflict. The presence of the parties was considered to be intimidating to the witnesses and as such their absence was crucial for the truth to prevail. The same is done to avoid enmity between the witnesses and the aggrieved parties. Since cross-examination of disputants generally resulted in new issues which were not subject to the

original complaint, and which may further polarize relationships, each party had to be cross-examined by the elders separately. Because each speaker would raise new issues, the conflicting parties would be called in at intervals to clarify some of the concerns raised. After all the views have been heard, any remaining member of the community would be asked to leave. The elders would then brainstorm over all the issues raised and the decision would be made through consensus.

Once the decision is made, the parties and community members would be called back separately to listen to the elder's verdict. It is generally forbidden to disclose to the parties the views of any of the elders, as doing so would attract a curse. As such the parties are only informed of the final decision. Usually, the complainant would be called in first to listen to the verdict. S/he would then be asked to leave after which the offending party would be called in and the verdict would be read to him/her again. This process would be followed by a joint session of reconciliation involving both parties. This stage of conflict resolution focuses more on the way forward with regard to prevention, resolution of future conflicts or addressing the underlying causes of the conflict. It is during this session that parties are informed of the need for a cleansing ceremony in cases where one of the parties engaged in an (in) action that is taboo during or before the conflict. After the conflict resolution session, the conflict parties, to the extent that they were not spouses, were often asked to shake hands to denote the end of hostilities. However, this requirement did not apply to spouses because shaking of hands would blur the power stratification and power balance between husbands, wives, and children and send the impression that they are equal.

Elders usually went to a great step to trace the historical background of the conflict. As such older witnesses were usually encouraged to speak out and narrate the historical foundation and dynamics of the conflicts. In many instances, several historical dimensions would emerge. When this happens, the main dispute is usually paused and the elders would shift their attention to the historical issue. This is because it was felt that to effectively address a conflict, all related dimensions must first be dealt with effectively. Thus it was not uncommon to attend a dispute resolution session only to have the main dispute postponed to a later date and an emergent issues dealt with on this day.

> For instance, in one of the dispute sessions attended in Bomet, a woman had abandoned her matrimonial home and children because the man refused to pay bride price. On further questioning, the man noted that it was a taboo for him to pay bride price because his father died before fully paying his mother's bride price. Although his mother was still alive, the fact that her bride price was not fully paid meant that her marriage to his father was incomplete in customary terms. After a lengthy process, the elders decided that:
> 1. The wife should surrender the children to their paternal grandmother (the man's mother).
> 2. The man's uncles and the wider family had to organize for the payment of the mother's bride price.
> 3. The family should visit the wife's parents to explain this situation and ask them to allow her return to the matrimonial home pending bride price payment.
> 4. Subject to the payment of the mother's bride price by the wider family and his uncles, the man would proceed to pay his wife's bride price.

The verdict usually included three components: an explanation of the wrong, an explanation of the customary law or moral principle violated and a brief advice session in which the party in

question would be advised on how to avoid or resolve similar problems in future. If the action is considered as a taboo, the party (or parties) would be advised on the relevant steps towards cleansing. The individual would then be asked to express his views about the verdict. Sometimes the views would attract a new round of discussions and opinions. This lengthy process often meant that a dispute resolution session could sometimes take up to a whole day to resolve.

One justification for having the verdict read to the husband and wife separately was to prevent a further strain on the union. This way no party would know the specifics of the guilt of the other party. Generally, in marital disputes, care was taken not to antagonize the power structure in the family. Thus when men were found guilty of offending their wives, the elders first called the man and informed him of his offence. They would then proceed to reprimand him and urge him to reform. This research also noted that even when men were found guilty of offending their wives or children by the elders, the women and children were still reprimanded. According to the elders, having the man acknowledge his mistake or apologize to his wife or child is not only humiliating but minimizes his power within the family. As such all effort was made to find fault with the woman or the child. However, women who were found 'guilty' were often asked to publicly apologise to their husbands in front of the elders. Since the elders operate on the highly respected Kipsigis adage that '*magisiire nyoet ab gat'* a husband would be expected to forgive his wife. Failing to accept a genuine apology before the elders is believed to attract bad omen and would generally lower the status of the individual in the community.

Although many *kipkaa* sessions involved wives apologising to their husbands and children apologising to their parents, none involved a scenario where a man was asked to apologise to his wife or children, perhaps denoting the entrenchment of patriarchy and masculinity in the dispute resolution sessions.

The elders do not generally sign any documents. However, they usually commit to follow up on the offender's reform and threaten to report any further violation to the chief. The fear of curses or bad omen, that is associated with disrespecting elders, often elicits compliance. Social pressure from other community members also worked to force the parties to comply. In some occasions, the orders were characterised with the specific bad omen that would befall the defiant party. Most orders were found to be self-reinforcing as they contained aspects that were coercive in their very nature.

4.3.2 Procedure during the chief's sessions

Parties who are dissatisfied with the elders' decisions often appeal to the assistant chief. Although complaints could be made at his home, the dispute resolution sessions take place at the chief's office. Usually, the chief would sit with several elders chosen from among the many villages in the sub-location. In many instances, the elders would be chosen on a rotational basis from the neighbouring villages. The village headman or any other elder who first handled the dispute would be present during the dispute resolution session to explain how the appealed decision was arrived at. In some instances, the case would be referred back to the elders for a new hearing, especially if new customary dimension or information that was not available during the first time comes up, if the parties express a need for reconciliation at the Kokwet level rather than at the chief or in cases where the chief feels that the matter is too minor for

him/her to handle. Sometimes, the parties would voluntarily suggest that their matter be referred back to the elders.

Unlike the elders who solely use customary law, the chiefs are conversant with some aspects of state law. As such, they used both customary law and state law. They would also use customary law to meet the ends of state law and explain to the parties what courts and other legal institutions would do if the matter remained unresolved and proceeded up to the court level. For instance, in enforcing the obligation to maintain a child, the chief would appeal to Kipsigis customs to justify this obligation but add that a stricter version of the same is reflected in state law. Because state law is associated with the police, expenses, courts and prison, parties would often find it easier to comply with customary law. The threat of being referred to the formal justice, therefore, acted as coercion towards compliance. The fact that chiefs often work very closely with Administration Police often means that the fear of the police, a reality that emerges from the brutality of the colonial and post-colonial policemen/policewomen, easily elicits compliance.

Unlike the elders, the assistant chiefs and chiefs keep records of the dispute. After the *kipkaa*, the decision is indicated on a record book complete with a list of the elders present and the names of the parties in the conflict. Parties are then asked either to sign or to stamp their thumbprints onto the assistant chief's record book as a sign of agreement with the decision of the assistant chief and indicate their identity card numbers. Those who are literate are asked to sign while those who are not often stumped their thumbs on the record book perhaps denoting the power of documents and documentation in elevating the 'seriousness' of an action and therefore eliciting compliance at the community level. Children even when present, do not sign or put thumbprints on the book. The elders present would also sign the record book or stump their thumbs on it. In case the parties are dissatisfied with this decision and decide to proceed to the chief, this record book is presented to the chief. However, in some instances, the assistant chief would write down a brief of the decision (essentially a copy of the agreement) and hand it to the chief. It is noteworthy that the parties are never given copies of the decision because the book is only kept by the assistant chief. See figures below for illustration.

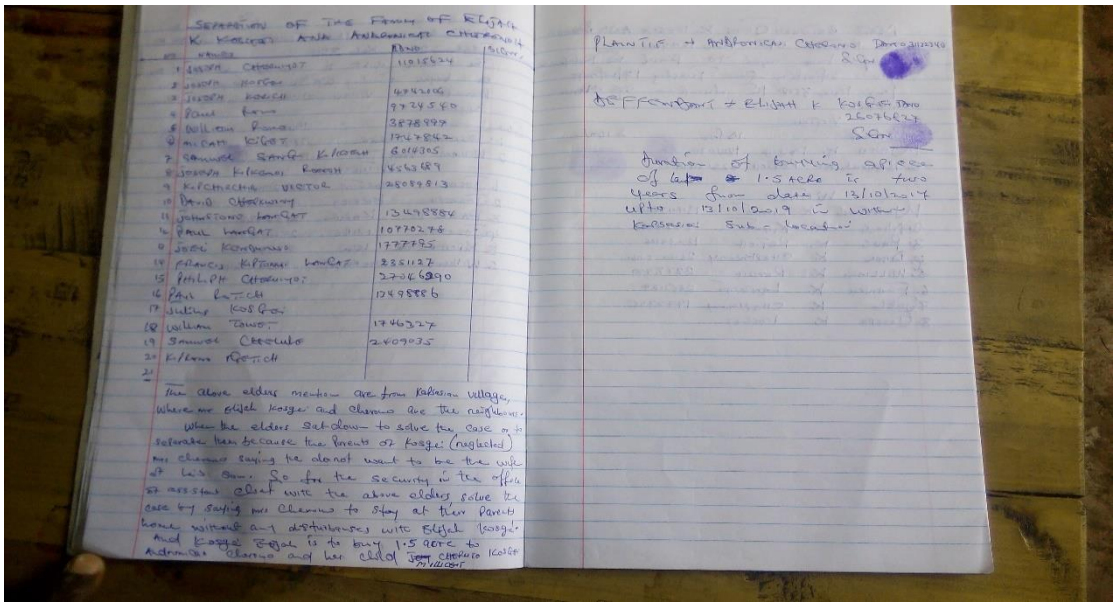

Fig 8: Copy of a chief's record book indicating the thumbprints of the parties.

Fig 9. A man who had been accused of beating his wife and children stumps his thumb on the Assistant Chief's record book at Chemamet Sub-location to denote his willingness to comply with the Assistant Chief's decision (seated is the female assistant chief).

The dispute resolution procedure at the chief and the assistant chief's office is basically the same. The chief in handling disputes would have with him two or three assistant chiefs and up to five elders depending on the nature of the case. Any further dissatisfaction with the chief's decision is reported to the Assistant County Commissioner, police or court.

Unlike the courts where the accuser and the defendant would have specific sitting arrangements, the sitting arrangement before the elders or the chief was more relaxed with parties independently selecting their seats. It was therefore common to have both the complainant and the accused sitting together during the sessions. Once a decision is made, the elders from where the disputants come from would be tasked to oversee the implementation of the chief's orders and report back to the chief. Sometimes the parties are asked to regularly report to the chief or elder to discuss their compliance with the resolution of the elders. This is especially common where the resolution includes some tangible action points, such as the undertaking of specific ceremonies.

Since the chiefs and elders enforce customary law which is perceived differently by the Kipsigis, the following section explores the dynamics involved in the Kipsigis conception of justice and law as the foundation of examining justice on children's matters.

4.4 The concepts of law and justice and the customary jurisdiction of the chief among the Kipsigis.

4.4.1 The Kipsigis conception of law

As observed in the previous chapters and in this thesis generally, law seems to be a form of lived experience so that what one considers to be law ceases to be statutes or even customary law in general but those elements of customary law (living law) that the individual considers to be binding. Members of the community and elders have different views on what constitutes customary law at any given time and as such, they accept some forms of customs as valid customary law while rejecting others as a misinterpretation of the same. Within this context, law ceases to be one unified set of rules, customs or practices as indicated in living law scholarship and becomes forms of social action and individual experience which uniquely compels the individual's action towards a given direction. Since each individual experiences customary law differently, what ends up being customary law varies across the Kipsigis community. This observation revisits the entire question of legal pluralism and implies the existence of multiple levels of pluralism even within the same legal domain- in this case, the living law domain. Thus at the beginning of a *kipkaa* session, each elder has his view of the customary law position on the given case. However, as the case progresses boundaries shift and the correct position of customary becomes even more blurred. The intermittent sessions in which the parties to the dispute are asked to leave are characterised by even more intense contestations over the right customary law. Eventually what emerges as customary law is a product of negotiations between the elders, and may, in essence, imply a compromise among the varied positions rather than the dominance of one position of the other(s). It is within this contestation of customary law that children matters are located.

Thus although state institution such as the police would consider an individual who does not violate his neighbours bodily integrity through assault to be a law-abiding citizen (with law in this context meaning state law) my fieldwork observed an immense influence of customary law on the action of individuals. Accordingly community members respect the bodily integrity of others on the basis of their respect of customary law (and the respective customary penalties) and not necessarily out of respect for state law. This is partly because institutions that enforce state law such as the courts and the police are often too physical removed from the community to exercise any form of coercion on the members. For instance the whole of Emurua Dikkir sub-county, with a population of 137,000 people has no court while the whole of Narok County, with a population of about 1.2 million people and an area of 18000 square Kilometres (almost half the size of the Netherlands) has only two courts stations with one located in Narok town and the other in Kilgoris Town. The residents of Emurua Dikkir, who want to access state courts must, therefore, travel to either Narok or Kilgoris towns. A similar scenario exists in Bomet and Kericho and is reflected in the organization of police stations too. Thus Emurua Dikkir has only one police station located in Emurua Dikkir town. State law is therefore too removed from the people of Emurua Dikkir to have any meaningful influence on their behaviour and the word 'law' at least in the statutory context is seen as an abstract concept associated with the police in Emurua Dikkir town or courts in Narok and Kilgoris towns.

Scholars contend that the fluidity of the word 'law' and its varied use among various societies has compromised the development of a unified meaning of law. Thus even concepts such as living law and customary law, although providing a counter-narrative to dominant notions of law, remain contested when empirically tested in socio-legal spaces such as among the Kipsigis. This contest is not necessarily on whether customary/ living law is law (or not) but on what exactly the individual Kipsigis person considers to be his customary law. This is because among the Kipsigis, the concept of law is so nuanced and experiential that every member (or set of members) seems to have a varied understanding of customary law. This research, therefore, showed the existence of pluralism within pluralism. That is, the existence of several variations of customary law which are always competing for space. Although interpretations that gain the support of elders/chiefs are usually considered to be the valid customary law, the researcher observed a great level of dissatisfaction with this mono-axial position, a reality which explains the high level of forum shopping across the various dispute resolution systems.

As highlighted in chapter two, the dilemma over whether to explore legal questions using the local Kipsigis dialect in which they are expressed as argued by Bohannan, or to interpret the same along the lines of English legal concepts as argued by Gluckmann is one which this researcher has had to grapple with but which does not seem to have a straight answer. Part of the challenge emerges from the fact that among the Kipsigis and many other communities, law is part of the lived human experience and therefore expressed in daily discourses as part of the communal common sense while the Anglo-American system considers law as a uniquely discrete and independent system complete with its own structure, concepts and features. This dichotomy is exacerbated by the fact that the distinction between law and non-law among the Kipsigis is generally blurred. The everydayness of this discourse is perhaps best reflected in the use of the word 'law' and 'Constitution' among the Kipsigis.

By definition, 'Constitution' refers to 'the organic and fundamental law of a nation or state which may be written or unwritten, establishing the character, organising the government and regulating, distributing and limiting the functions of its different departments and prescribing the extent and manner of the exercise of sovereign powers'. However, in its everyday use among the Kipsigis, the 'Constitution' (called *Katiba* in Swahili) is used to refer to state law in general. Thus statutes, government policy and Ministry regulations are all termed as 'Constitution'. Community members thus considered both law (understood as state law or customary law) to be enforceable under informal justice systems, specifically the chief, so that many parties often referenced *Katiba* in their claims before chiefs although this was majorly done to back up the core argument which was usually founded on customary law. Similar experiences were seen in chief's verdicts which were laced with mentions of *Katiba inasema*, (the Constitution says). However, the elders' sessions (*kipkaas*) rarely involved the mentions of any state law whatsoever.

Because most Kenyans are multilingual, they speak both Swahili and their mother tongue. Accordingly, most Kipsigis speak both the Kipsigis dialect and Swahili. The word *sheria* which means law in Swahili is borrowed from sharia the Arabic word for law. The 'Constitution' is used interchangeably with *sheria ya serikali* (government law). In the Kipsigis language, the word '*ngotutik*' is used for state law (*sheria ya serikali)* while *pitet* (which generally means tradition) is used to refer to customary law (*sheria ya Kipsigis*). However, in other communities such as the Luo of Western Kenya, both state law and customary law are referenced using the

same word. The table below highlights the different ways in which the word law is understood among various communities in Kenya.

Ethnic community	State law/written law	Customary law
Kipsigis	Ngotutik	Pitet
Kisii	Richiko	Richiko
Luo	Chik	Chik
Kamba	Miayao	Kithyo
Bukusu	Kamalaka	Kamalaka
Marachi	Malako	Malako
Kikuyu	Kirira	Miikarire/Mitugo
Meru	Wadho	Wadho/Mitugo

Source: Comparative field work.

As noted above, some communities do not distinguish between state law and customary law. The meaning of the word 'law' is therefore inferred from the context in which one is speaking. However, among the Kipsigis, a marked distinction exists between *ngotutik* and (*pitet)*. Although *pitet* is respected due to a feeling of legitimacy and the fear of social sanctions that would come about as a result of the violation, *ngotutik* is closely linked to the police, court processes or imprisonment. As such it is respected due to a fear of the state law enforcement agencies. Offences determined by Kipsigis chiefs can, therefore, be broadly categorised into three groups:

a) Those actions that violate *ngotutik* but do not violate *pitet*: These included, female genital mutilation, child marriage and some forms of child labour, some forms of wife beating, beating of children, discontinuing the education of teenage mothers and issues emerging from unregistered customary marriages.
b) Actions that violate *pitet* but do not violate *ngotutik*: These included, disinheritance of children, some forms of divorce, disrespecting mother in law, differing with parents, failing to provide for old parents and fathers having custody of young children upon divorce/separation.
c) Actions that violate both *ngotutik* and *pitet*: These include failing to provide for children, murder, failing to pay dowry in customary marriages, some forms of child labour, assault, theft by children, failing to take children to school, child neglect.
d) Actions that neither violate *ngotutik nor pitet* but violate generally accepted standards of decency, morality or acceptable standards of behaviour for children: Children of their own volition refusing to go to school, 'consensual defilement' between children and disputes around dress code of girls. Consensual defilement occurs when two children decide to voluntarily have sexual intercourse. The Sexual Offences Act, 2006 considers defilement to be 'an act which causes penetration with a child.' It, therefore, presumes that one of the parties is an adult, yet as this study found out under chapter three, myriad of cases exist where children voluntary have sexual intercourse with each other creating a scenario that this study considers to be 'consensual defilement.'

As noted above Kipsigis customs are used to resolve a wide variety of disputes. It is also noteworthy that some disputes encompass all four dimensions. A case in point is that of

Cherotich, a practising Christian who abandoned her 1-year-old child and matrimonial home because her husband planned to marry a second wife.

> As a staunch Christian, Cherotich felt that she could not stay in a polygamous union. During the hearing, the chief and elders argued that since Kalenjin customs expects the woman to take custody of a child when divorcing or separating, Cherotich had violated Kipsigis customs. They also noted that although Cherotich was a Christian, she was in a customary marriage and therefore could not divorce without undergoing *Keepet lool* or *Kiilgee* (customary divorce ceremonies). However since polygamy did not constitute a ground for *keepet lool* under customary law, she could not be allowed to divorce. At the same time, her Christian faith discouraged both divorce and traditional customary divorce ceremonies which the church considered as ritualistic and therefore inconsistent with Christian teachings. Accordingly, all Christian converts who were married through African customary marriages are expected to undergo Christian wedding ceremonies. However, Cherotich could not do the same because her husband, though a church member, was not a staunch Christian.
>
> Cherotich's case is further complicated by the Marriage Act, 2014 and Marriage Regulations, 2017 which not only requires those in customary marriages to register them but also considers them to be polygamous or potentially polygamous. The concept of potential polygamy implies that even if a customary marriage was monogamous as at the time of its registration, the husband would be free to marry more women in the course of that marriage unless the marriage is 'elevated' to a civil marriage which is presumed to monogamous. Cherotich's case thus demonstrates the overlap between state law, religious law and customary law and the challenges that women and girls in post-colonial societies face in trying to navigate through the complex array of laws.

4.4.2 Taboos and the enforcement of customary law among the Kipsigis

As widely held in legal pluralism scholarship, customary law, unlike state law has an internal enforcement mechanism. Taboos are therefore a form of this mechanism and work by generating compulsion within and between the individual(s). They are internal to the community (in this case Kipsigis community) and whereas acting compulsively on its 'members', may not compel 'non-members'[256] even when they live within the community. Thus taboos from one community cannot affect (or influence) a member of another community even if he was to engage in a prohibited action. However 'non-members' often comply with the customs of the communities in which they live, first because of the social pressure associated with deviance, secondly as a sign of goodwill and thirdly because in many instances, taboos are similar across several communities.

Taboos *(indenyon)* thus form an integral part of the Kipsigis customs, tradition and value system, providing an effective system of social control. They prohibit certain acts and omissions on the part of the members of the community and prescribe sanctions against those who contravene them. Sanctions are often in the form of death, madness, bad omen or curses.

[256] 'Non- members' is used to denote those members of a given community who do not belong to the same socio-linguistic group as the host community.

Some sanctions such as bad omens occur automatically while others like curses require intervention of elders.

Some of the strongest taboos include those associated with incest. The Kipsigis customs prohibit individuals from having sexual relationships or marrying members of their clan. Incest is so much frowned upon, that it has no name in Kipsigis language. It is believed that offspring born out of such relationships come with abnormalities and bad omen. As a remedy, either the man or the woman who has committed incest by getting married to a relative is assigned a different clan name.

Taboos are also concerned with an individual's failure to participate in customary rites of passage such as initiation which is considered as a rite of passage. Traditionally, Kipsigis society required both girls and boys to undergo initiation ceremonies in the form of circumcision. During that period, boys are not only circumcised but also secluded in the forest together with their mentors and taken through training on adulthood. During this period, the initiatives are prohibited from interacting with women and 'children'. Although the initiates would, based on their age, be considered as children, Kipsigis customary law considers them as adults. Children are therefore those who have not been circumcised. Interacting with children and women during this period is therefore considered as taboo. Due to the value attached to initiation, an uncircumcised person is not allowed to marry and forced circumcision may be done if the person completely refuses to undergo the process.

Finally, there are taboos which apply to how men should relate to women, especially for married couples. Male superiority in Kipsigis culture is very pronounced. If in the course of a scuffle between a husband and a wife, the woman bites or hits the man resulting into bleeding, she will immediately be considered as unclean. This is because culture views it as improper for 'the man of the house' to shed blood since he is the head of the family and therefore responsible for its growth. Such a woman is referred to as *Sogoran*. As a remedy, she has to undergo a cleansing ceremony in which a goat is slaughtered roasted and eaten by the elders and the blood used for the cleansing.

It is, however, important to note that not all actions that violated customary law are considered as taboo. On one hand, minor offences against customary law are addressed through restorative efforts by informal justice processes. However serious violations of customary law are considered as taboo and can only be cured through two ways; undergoing cleansing ceremonies that often involved chewing of specific herbs or slaughtering of an animal such as a goat or both. This process is presided over by an elder in the community. The other option is to convert into a staunch Christian. Christianity is considered to have powers to shield the individual from the repercussions of violating the customary law and equally denoted that the individual has reformed.

Although many Kipsigis people identify as Christians, only a few are actually practicing Christians with most of them adhering to a mix of Christian teaching and traditional belief systems based on the issue at hand. Accordingly, only practicing Christians are considered to be immune from curses or bad omen that results from the violation of customs. Failure to either become a practicing Christian or embrace cleansing would mean that the individual stands cursed in which case a bad omen such as death, disability, sickness, death of children or a spouse or madness, would befall him/her. It is also believed that once these have occurred they

cannot be reversed and therefore community members are scared of taboos and would do everything to undergo the cleansing if and when they violated customs.

Taboos, curses, blessings and cleansing work through social action and social pressure. In other words, the mere belief that a catastrophe will befall someone for violating customary law (and committing a taboo) is coercive enough to elicit compliance, even if the catastrophe does not happen. Since customs have explanations for all instances where the speculated damage does not happen, individuals often avoid the risk involves by abstaining from the action that is considered taboo. Secondly because associating with a person who has committed a taboo is sometimes considered as a taboo too (or a form of deviance), people general comply with customary requirements even when they find the threats unconvincing or invalid for fear of the consequent ostracism and social isolation.

4.4.3 The Kipsigis conception of justice

It must be noted that justice as a concept is highly fluid with each society possessing its own view of justice. However, justice in Kipsigis customary law seems to have two strands. On one hand, it is considered to imply the application of customary law and within that context, restoration of relationships during a dispute resolution process. Accordingly, the parties to the disputes considered justice to have been done when strategies were put in place to restore relationships and the entire process of restoring those relationships. In other words, whereas in classical understanding, justice is seen as a one-off event that is either present or absent at the point of dispute resolution, the Kipsigis consider justice as a process of healing and reconciliation. Asked whether they thought justice had been done, most parties to the disputes pointed out that they were 'waiting to see' and would only determine the same based on the behaviour change of the offender. Even when decisions were made in favour of an individual, an opinion of whether the action was just or otherwise was partly dependent on the actualization of the decision. Accordingly, justice in cases of violence against women and children as well as cases of child maintenance could only be determined when the man commenced the payment of child maintenance or ceased to be violent. Any question of justice was thus answered through speculative responses.

At the same time, children were not seen as subjects of justice. Accordingly, they were often excluded from most deliberation so that justice was tied to their parents and not directly to them. Thus asked whether they dispensed justice, the elders would often reply by citing examples of how they had done justice to the parents of the children but completely ignored the question of justice for the children. This is because as shall be discussed later, children are seen as a property of their parents so that justice for the parent in a child's case is seen as justice for the child. In many instances granting the wishes of the parent was equated to justice for the child while denial of the parent's wishes was equally considered as an injustice to the child. The child was therefore not a subject matter of justice but an indirect recipient of the same.

The second conception looks at justice within the context of impartiality *(imanit)*. *Imanit* is said to be have been served when disputes are heard and determined in an impartial manner. At the core of justice is impartiality, so much so that impartiality and justice in Kipsigis language mean the same and can be used interchangeably. Justice is therefore served when all parties and their witnesses are freely allowed to speak during the *kipkaa*. For instance, in any given dispute,

elders are invited to preside over the matter and both the complainant, *lolomikonindet* and the defendant *Kolindet* are accorded the right to be heard. Witnesses, *(baorinik)* from both sides are called to testify *(kopaorian)*. Determination, *Kichomwio* is guided by evidence brought before the elders, the position of customary law on the matter and the past behaviour of each of the parties. After the resolution of a dispute, the complainant and the defendant are then reconciled through a symbolic handshake to indicate that both parties are satisfied with the outcome. This is meant to denote acceptance of the verdict of the elders and belief that *imanit* has been done.

Unlike justice which is linked to legal or judicial processes, *imanit* is not strictly a customary legal concept but an element of well-being that each individual in society is expected to have in his/her daily interaction with others. Accordingly, the *kipkaa* would borrow from virtues that are considered to be core to the integrity and goodness of a Kipsigis as a way of establishing the expected standards of behaviour and identifying the point of deviance from the same. The Kipsigis conception of justice was therefore largely at variance with the state's conception of justice which delinks the concept from the restoration of relationships. At the same time, justice at the state level is neither tied to any behaviour change but is only limited to adversarial response to any offence. This explains why most Kipsigis community members were averse to having their children appear before formal justice systems and would try as much as possible to divert their children from the formal justice processes.

As a human quality, justice among the Kipsigis was much more concrete when translated into Swahili, an equally widely spoken language among East Africans including the Kipsigis and one of the languages used in the field interviews. Thus during the field interviews, parties would often speak of *haki* which directly translated into justice or right as understood in English but equally has a wider use as it implies non-legal action and could generally be used to denote goodness or fairness in a non-dispute setting. What the parties in the interviews would call *haki za watoto* in Swahili would mean 'children's legal rights' but the just resolution of a children's matter under informal justice systems would not be termed as *haki za watoto*. This is because the children were seen as rightless properties of parents so that their *haki*, as observed earlier was conferred upon the parent. The only variation occurred in the few instances when mature minors were in conflict with the law and appeared before the chiefs without their parents. In this case, *haki* could be used with reference to the child. The overlap between the conception of law and justice within Swahili and Kipsigis was observable across the dispute resolution settings where the two languages were jointly used or where interviews and focus group discussions were conducted in Swahili.

The informal justice procedures and processes identified have had mixed reactions from members of the Kipsigis communities. On one hand, there are those who passively accept the decisions of the informal justice system in which they first sought justice without attempting to challenge the same in other forums. This group often believes that elders and chiefs possess a legitimate understanding of customary law and that their decisions whether acceptable or not should not be challenged as such a challenge implies defiance to authority. A second group consists of those who do not hesitate to challenge the decisions of the elders and or chiefs and often try to exhaust all the appeal mechanisms. This group is often characterised by forum shopping in which they seek justice from different forums depending on the nature of the case and the expected outcome. Although the Kipsigis conception of justice objectifies children by excluding them from the understanding and determination of justice, children have no right to

appeal and forum shopping in as far as children's cases are concerned, can only be done by their parents or guardians. The conception of justice as a process rather than as an event explains why most cases of appeals across the various justice systems often took a long time from the date of first determination. The following section explores the nature of forum shopping among the Kipsigis.

4.5 Forum shopping, forum shifting and shopping forum among the Kipsigis dispute resolution systems

4.5.1 Structure of forum shopping among the Kipsigis

Research on legal pluralism has mainly focused on the dichotomy between state and non-state justice systems, and the corresponding state and customary law. However as noted in the previous section, what is considered as informal justice system is not one homogenous unit of justice institution. Rather the system is itself characterised by plurality; plurality in the understanding of what customary law is, as discussed in the previous chapter, and plurality in dispute resolution systems. Thus the *Kokwet*, clan elders, VCOs, chief, assistant chief, *Myoot* and *Olomasani* council of elders all co-exist in the same cultural space and are approached at different times for dispute resolution by members of the Kipsigis community.

Within this context, community members engage in forum shopping. Forum shopping, as defined in chapter two refers to the process through which members of a given community deliberately select specific dispute resolution settings over others in line with their anticipated outcomes and situations. Forum shopping among the Kipsigis can be said to exist at two levels: On one hand, disputants often have to make the choice between formal and informal justice systems. Thus even for those residing near the courts, such as in Bomet and Kericho towns, there is usually a choice between the formal systems and the informal systems. A detailed rational calculation goes into choosing what is suitable between informal and formal justice. Asked why she opted to report her child maintenance case to the Chief who lives far away from her and skipped the Bomet Children's Court which is only a few meters from her home, Jane noted that:

> I do not know what is inside that Court. Whenever I pass near the County commissioner's office, I usually see a sign written Children's Court, but I have never known the exact building that houses the court because there are many buildings in that compound. Also, you know, I do not know the magistrate. He may even be a Kisii or a Kikuyu. So if I was to go and find a Kisii or Kikuyu magistrate, will he/she help me? Can he understand the Kipsigis issues that we have here? I do not think he can…No No, I do not think so.

Although scholars like Desmond Kaunda and Janine Ubink have observed that high cost of litigation, distance, and procedures contribute to the prevalence of informal justice systems in rural communities as discussed in chapter two, this research found out that the very nature of formal justice systems is inconsistent with the Kipsigis understanding of justice as discussed extensively in the preceding section. Part of the reason is that among the Kipsigis, one only presents a case to a dispute resolver whom he /he has trust in and whom she has originally interacted with. This is because the acceptance of the verdict would depend upon the trust that the dispute resolver elicits from the disputants so that the decisions of an untrustworthy dispute

resolver would easily be ignored or appealed. At the same time due to the fluidity of disputes in which they transcend state and customary law, there is a general belief that only those who are well versed in Kipsigis customary law can meaningfully resolve the disputes. These factors put together contribute to the psychological disconnect between the state courts and the community and explain Jane's predicament.

Generally speaking, forum shopping at the community level can be divided into two categories: Inter-systemic forum shopping, which involves crossing the boundary of the informal into the formal justice systems or vice versa and intra-systemic forum shopping in which disputants forum-shop within the same justice system. Still, within the intra-systemic forum shopping, lie vertical and horizontal forum shopping. Vertical forum shopping involves moving from one lower dispute resolution forum to a higher dispute resolution forum while horizontal forum shopping involves moving across two different dispute resolution structures of the same level.

4.5.2 Inter-systemic forum shopping

Inter-systemic forum shopping can take place in two dimensions. In the first dimension, parties who are dissatisfied with the informal justice processes escalate their disputes to the Magistrate's Court. In such disputes, parties often argue that the elders/chiefs misinterpreted customary law to favour their opponents or that they were manifestly unfair. The second category involves parties who, after pursuing the formal court option, decide to (re)present the same case to the elders or chief, either because the orders given by the court are unimplementable in a customary setting, because the court procedures are too complicated or because they are generally unhappy with the decision. The following cases highlight this reality:

> Chebet's husband worked in a tea factory in Kericho and would often return home during weekends. However, over time, he abandoned his family and married another woman in Kericho town. Chebet's parents asked her to return home with her children. She consequently filed a case at the Children's Court for child maintenance. The Court ordered her husband to pay her Ksh. 4000 per month (approx. 40 euros) as child maintenance. However, after a few months, the husband lost his job, returned home and refused to pay any more child maintenance arguing that he did not have any other income. Chebet reported the matter to the chief who after listening to the case, decided that there was a need to reconcile the two families. Accordingly, the elders decided that they would convene a reconciliation session with the two parties and their relatives. Meanwhile, the husband was asked to give Chebet a sack of maize (about 90 kg of maize) so that she could feed the children.
>
> In another instance, Mary was following up on child custody and maintenance case that she had filed at the Children's Court in Kericho. Upon their separation, the husband remained with two boys while she left with three girls. Mary then filed a case in court to claim the two boys and ask for child maintenance from the husband. The case proceeded for about a year before it stalled because the case file disappeared from the court registry. After several unsuccessful searches at the court registry, Mary decided to report the case to the chief. The husband was subsequently summoned to the chief's office and a dispute resolution session was scheduled. After the hearing, the elders and chief decided that the husband had to surrender all the children to the wife before a reconciliation session could be convened

between the two families. According to the elders, the boys were too young to stay with their father and their grandmother was equally too old to care for them. They also asked him to give 40 kg of maize to Mary to feed the children as she claimed that she did not have any food in the house. A reconciliation session would only be convened after the husband's compliance with the elder's decision.

The above cases highlight how the two justice systems complement each other in dispute resolution. Thus since maintenance orders are given in monetary terms, courts usually find it difficult to quantify non-monetary support. Accordingly, only orders that can be couched in monetary terms can be granted by courts. However, it is noteworthy that most Kenyans in rural areas are peasants who often rely on subsistence agriculture for survival. Court orders fashioned in monetary terms are therefore inconsistent with their realities. Even when the same is granted, enforcing them becomes difficult once an individual exits the formal employment sector. Aggrieved parties, therefore, have to file the same cases before the chiefs and elders for 'orders' that are consistent with the prevailing socio-economic realities. This reality is responsible for the widespread inter- systemic forum shopping at the community level. At the same time, children needs such as food, education and shelter require quick intervention because of the temporariness of childhood and the centrality of the said needs to the child's survival. However, due to backlog of cases and the long procedures at the children's courts, women often opt to pursue the same cases through informal justice systems which are considered to be quicker and therefore more responsive to the immediate child needs. The very fact that informal justice systems address both the children matter and the circumstances resulting into the said matter, such as disputes between the spouses, is equally found to be more appealing than the single-axis approach embraced by the children's court in which children matters are isolated from all other concerns. This presumption under state law, that children rights and interests are isolated from those of their parents is therefore inconsistent with Kipsigis conceptions of childhood and is, in essence, the biggest contributor to inter-systemic forum shopping.

One obstacle to forum shopping, especially from the informal to the formal, is the question of legal procedures. For instance, two magistrates interviewed in this study noted that they had to move houses and live in distant places from their work stations due to the fact that the communities that they serve, to the extent that they know their identities as magistrates, would stop them in church or in other social forums to report cases. Since the nature of the formal legal system is generally inconsistent with this 'reporting', they always had to request the parties to do a formal reporting through the court processes. The extent to which this was done was generally unknown. Although the scope and manifestation of this attempt to informalize the formal justice systems is unknown, it confirms the earlier discussions on the extent to which formal procedures prevent people from using formal justice systems.

4.5.3 Intra-systemic forum shopping

This is the most common form of forum shopping among the Kipsigis. Aggrieved parties often explore the most workable option among the variety of dispute resolution institutions within the informal system. The choice largely depends on the nature of the conflict and the kind of solution intended. For instance, it was observed that members of the Kipsigis community who live near the borders do not adhere to locational and sub locational boundaries when filing disputes. It was therefore common for an individual to file his dispute before a chief in his /her

location and move it away to another location if he receives an unsatisfactory decision. This flexibility in the filing of cases made it possible to avoid those chiefs that the community members found to be biased or corrupt.

Vertical intra-systemic forum shopping often involves a person filing a case before the elders and escalating it to the assistant chief and the chief in cases of unsatisfactory decisions by the chief, or filing it before the Kokwet and following it up with the Ololmasani or Myoot elders. Notwithstanding their legal status, Chiefs are generally considered to be inferior to the *Ololmasani* and *Myoot* elders in matters that concern customary law. Horizontal forum shopping involves parties filing the same case before several *Kokwets* or before the *Kokwet* and family elders. However, it was observed that in all instances where an aggrieved party vertically or horizontally forum-shopped, the dispute resolution session would not proceed until a member of the previous *Kokwet* that resolved the matter is called in to explain the reasons for the decision in question. This is because reviewing a case determined by one set of elders without involving them was seen as disrespectful and therefore a threat to the harmonious relationship of the elders themselves. The new set of elders would first establish the customary foundation of the decisions made by the previous *Kokwet*, listen to the same case and arrive at a new or similar decision. The same applied to vertical forum shopping where decisions were appealed from the elders to the assistant chief. Commenting about the referral of cases, Chemamet Chief (in Emurua Dikkir) observed that:

> Sometimes people disagree with the decisions of the assistant chief. In such cases, the assistant chief will document everything that happened. All elders and the assistant chief who presided over the case will also write their names and sign. Then the complainant will be given the letter to come to me. However at the council of elders, sometimes they refer verbally without any written document. When the case comes up, I schedule a date and invite one or two elders who handled the case before to join me and other four elders with whom I usually sit here. Then we can decide the case.

Corruption, inefficiency, and misinterpretation of customary law and dissatisfaction with the decisions of the lower level dispute resolvers continue to be the main reasons for the prevalence of forum shopping. The availability of many dispute resolution forums often means that elders and chiefs are much more cautious as they know that their decisions will be appealed in other forums. The public nature of the sessions often results in embarrassment if the higher or parallel forums finds out that the decision was unreasonable or made through the influence of corruption. Commenting about the referrals to his office, the Kabolecho chief observed that:

> Corruption is slowly creeping into these councils of elders so they sometimes accept money to decide in a specific way. When the case comes here I sit with other elders to review that decision and sometimes if we realize that it was oppressive to one party, we set it aside. However, sometimes you also realize that the decision although oppressive was made in good faith without any undue influence. Either way, you can just overturn it.

Although the assistant chief would ordinarily be present in cases where his decisions have been appealed to the chief, his participation would be very limited. This is because most assistant chief's *kipkaa* sessions are formal and have written records which can be used at a higher level of appeal. The level of formality of the processes increased as the dispute proceeded up the

chain, with institutions like the chief's office documenting everything and the lower levels such as elders not documenting much. However, there was also variability in this respect, a factor that is influenced by the disparity in the education levels across the research areas. Accordingly, there was more documentation of decisions among the elders and chiefs in Kericho and Bomet compared to Emurua Dikkir in Narok County.

In many instances, the witnesses across the various forums would remain the same although any person with additional information about the case is always allowed to attend during the appeals process. However, in a case where the dispute involved violence or extramarital affairs, the parents of the disputants would take a prominent role in the dispute resolution process especially if the parties to the marriage were young. Any decision made by the chief or elders had to be affirmed by the parents or relatives of both parties. It was therefore common to have a decision appealed not necessarily because the primary parties were dissatisfied with the decision of the lower level forum but because the parents or other family members were uncomfortable with it. This especially happened where the parents of the spouses had been asked to undertake actions such as surrendering the children back to the man or paying a fine for the extramarital affairs of their daughter. Forum shopping largely occurred either because the parties disputed the customary standpoint of the elders or because although the decision was anchored on customary law they found it unjust.

Although the *Kokwet* are village elders who are meant to operate at the village level, the study noted that the institution takes a transboundary approach in which elders who have proved to be efficient in dispute resolution can be called to another village or location to help in the resolution of a specific dispute. The administrative units established by the government, such as location, sub-location, and divisions are largely irrelevant in as far as dispute resolution at the community levels is concerned. In the same way, it is common for a chief in one locality to call another chief from another location to help in dispute resolution within his area of jurisdiction.

Volunteer children's officers (VCOs) are also a forum shopping option for members of the Kipsigis community. As noted in chapter three, a VCO is a community member who volunteers his/her time and resources to serve children in the community. These individuals are not government employees and are trained by NGOs and government on child rights and welfare. They often work from their homes and refer cases to the Sub-county Children officers.

The study observed that in several instances, VCOs actually refer cases to the chiefs/elders or sit together with chiefs and elders in the determination of cases. Although they would generally highlight the position of state law during the dispute resolution process, their account was often overridden by the members present and since decisions are made by consensus, they often have to comply with the views of the majority of the elders. The very fact that they are members of the community often means that they would generally be sympathetic to the position of the elders even when they disagree with it. However, on some occasions, VCOs would use the elders' sessions to gather additional information about problematic cases and later refer the cases to the Children Officer.

Because of their adherence to state law, at least on some occasions, VCOs serve as an appeal structure whenever disputants are aggrieved by the decisions of the elders or chief. However, in cases where they stuck to state law, VCOs were quite unpopular with the chiefs and elders

but were much more approached by community members on appeal from the elders and chiefs, where the VCOs had a mutual working relationship with the chief or in cases where they were known to apply customary law, those appealing the decision of the chief would skip the VCO and go directly to the Children officer, to the assistant County Commissioner or to court. Part of the reason is that people chosen as VCOs are not necessarily elders nor is the understanding of customary law a consideration for their appointment. They are appointed based on their level of commitment to community welfare, professional background or general approval of their reputation by the Children Officer. Thus a disagreement over the decision of the chiefs or elders would not be reported to the VCO on account of misinterpretation of customary law. Rather those who report cases to the VCOs often cite a violation of state law by the other dispute resolution forums. At the same time, VCOs would only escalate cases from the *kipkaa* to the Children office when they felt that the decisions violated state law and not when they violate customary law.

The rivalry between VCOs and the chiefs over who exactly represents the voice of the state in children matters at the grassroots level was equally a dominant theme in the fieldwork. Since they were trained on children matters, VCOs often considered themselves to be more knowledgeable than chiefs on children rights while chiefs, by virtue of their general community acceptance, position as civil servants, performance and legal backing often perceive themselves as the ultimate voice of the government at the grass-root level. This tension between the two institutions is best reflected in the locational and sub-locational Area Advisory Councils (AACs) where chiefs and VCOs often disagree on what constitutes child labour or best interest of the child. *Mama watoto* (the mother of children) a VCO in Sigor (Bomet) laments:

> You know these chiefs and elders do not know anything about children rights. So when you leave these matters in their hands, the children will suffer because they will always favour the adults. For example, some parents seriously beat their children almost to the point of killing them. When such cases go before the elders and chiefs they will spend a long time listening to both parties and eventually declare that the child was guilty of one or two things. Then they will admonish or cane him/her.

The acceptability of the customary pronouncement of a chief partly depends on the age of the chief. Although state law allows for the appointment of young people as chiefs, such chiefs are considered to be of lesser social standing in the community. Generally, the status and views of older chiefs especially on customary law are more accepted and less appealed to other forums. According to a number of 'forum shoppers' interviewed, younger chiefs, (who are generally more educated than their older colleagues) do not understand customary law and sometimes even make decisions that violate customary law. John's case best highlights this reality.

> John, an elderly man was accused of being drunk and disorderly and arrested. He was arraigned in court and sentenced to community service in line with the Community Service Order Act, 1998 which requires courts to send petty offenders back to the chiefs or other government offices for assignment of public duties in the community. The Act defines community work as 'unpaid public work within a community, for the benefit of that community, for a period not exceeding the term of imprisonment for which the court would have sentenced the offender.' Community service would include work around environmental conservation, roads, drainage clearance, clearing bushes around community water points, working in schools and hospitals and government or

community institutions. Those sentenced to community work are usually sent to the area chief for assignment of duties and supervision or to the concerned government official in case of other government institutions.

John was therefore assigned work by the chief in a neighbouring primary school close to his wife's maternal home. Specifically, his roles included cleaning classrooms and the bushes within and around the school compound. However, under customary law, it was a taboo for John to sweep the classroom as some of the children of his wife's relatives (who collectively would constitute his in-laws) went to that school. John, therefore, refused to perform this community work and reported the matter to the elders. The chief was asked to give him alternative work in another school by the elders who also criticised him for being young and therefore out of touch with the customs of the community.

Tension over who should speak for and of customary law is a widely researched question. As noted above what is customary law partly depends on the status of the person who is pronouncing himself on it. At the same time, there is an ongoing tension between state law and customary law on the setting of normative standards. Whereas state law, such as Community Service Order Act, 1998 claims validity on the basis of its origin from the state, its attempt to address the problem of petty crimes through community service runs afoul the living law, putting state law implementers in conflict with the community customary institutions. At the same time, those offended by state law such as John would opt for a customary means of redress because the customary foundation of his claim would be inconsistent with the nature of state law and courts. Accordingly, forum shopping enables John to meet the ends of state law without compromising the standards of customary law.

This research revealed the existence of varied conceptions of customary law with the central question at the community level being the foundation of customary law. On one hand, there was a belief among some community members that because the position of elders is considered as customary, any decisions that they make would be acceptable on the strength of their customary positions. Accordingly, those who hold this position in the community argue that the decision of elders should be accepted and that those who dispute it and look for alternative forums to resolve their disputes were stubborn and disrespectful of the elders.

On the other hand were community members who believed that traditional leaders, like elders, are not experts of tradition. This is because they considered customary law to be widely known by every member of the Kipsigis community. Secondly, there was a feeling that the elders and chiefs had increasingly become corrupt and would thus bend their interpretation of customary law to suit the interest of the bribe giver or the more economically endowed party in the dispute. Because men were generally wealthier than the women among the Kipsigis, complaints about prejudice of informal justice systems were most common in child disputes pitting women against men. Thus some people seeking the intervention of the elders already anticipated a particular customary outcome and were very quick to look for alternative forums if they felt that the elders had deviated from the 'correct' customary position.

4.5.4 Forum shifting

Forum shifting refers to the tendency of one dispute resolution system to avoid handling controversial or problematic cases by referring them to an alternative forum. Forum shifting often results from a feeling among a dispute resolver that he/she lacks the customary status to preside over the dispute (such as those disputes that require cleansing or rituals), a view that state law is so robust and rigid on the (in) action that any deviation from state law would result in the arrest of the customary authority or a feeling that the problem in question is unsuitable for customary law due to its nature complication or implication. Generally speaking, forum shifting was common in cases concerning girls especially in view of the renewed interest of state law, state institutions and NGOs in the protection of the girl child. Both the chief, the elders, religious leaders and VCOs are often involved in forum shifting. Highlighting her role in forum shifting, a VCO in Bomet observes:

> You know there are cases that should not be handled by the elders and chiefs, such as defilement, so when they call me to participate in such cases, I simply go, gather the facts and later on report to the police or Children Officer. Also sometimes they listen to cases and decide them very wrongly. In these cases, I would call the parties and refer the matter to the children office in Bomet. I would not argue with the chief because he would not listen to me.

Another common example of forum shifting involved the cases of FGM. Since the Prohibition of FGM Act prescribes jail term for offenders including those who are aware of but fail to report cases of FGM to the police, chiefs are often unwilling to handle matters of FGM for fear of arrest, prosecution or sacking. Sections 19-29 of the Prohibition of FGM Act, 2011 makes it illegal; to undergo FGM in Kenya regardless of consent; to undergo FGM outside Kenya while possessing a Kenyan passport; not to report that FGM ceremony is ongoing or is about to take place; to rent one's premises for the undertaking FGM; to conduct FGM; to force someone to undergo FGM and to abuse or ridicule someone for not undergoing FGM. The consequence of this broad-based legislation means that one single FGM case would often automatically translate into whole families being arrested because the members of the families either ridiculed the victim, knew that FGM was taking place, organised for it or failed to report it. Fearing that handling FGM cases would compel them to report the matters to the police (and essentially result in whole families being dragged to court), many chiefs often refer such matters to the elders. Part of the reason why a chief would shirk these cases is because the arrest of a whole family would compromise his position in the communities and even endanger his life. Highlighting this challenge, an elder in Chepalungu (Bomet) notes:

> These cases of FGM are very many here, especially in Lelait Location near Transmara and generally in this Chepalungu area. Last year, I reported such a case to the chief. He summoned the parents of the girl and other parties but they turned up with arrows and shot him. He was admitted at Tenwek hospital for several days. He was so much hated for trying to stop this practice. He would even speak in his *barazas* against FGM.

At the same time, since government policy prohibits chiefs from resolving FGM cases, many chiefs often shift FGM related disputes to elders. Thus whenever a case in which a couple has family differences concerning the circumcision of their girls end up at the chief's office, s/he would immediately refer that dispute to the elders. The assumption in government (through the

Prohibition of FGM Act, 2011) that all FGM cases reported to the chief must be referred to the police and henceforth to court is therefore not in tandem with the social practices of the Kipsigis in which reporting a case to the police or court is considered as undesirable first because it would invite the police to the community for investigation (an issue that is considered disruptive) but also because of the real risk that the perpetrator will be physically removed from the community and incarcerated. Chiefs as members of the community, therefore, have to find a way of adhering to government policy without offending the community's legitimate expectation with regards to their roles. Referring such cases to the elders is, therefore, one way of reconciling their dual identities and expectation and avoid interdiction on account of 'protecting' the perpetrators of FGM. It is noteworthy that unlike the chief, the elders operate a parallel system from the state and cannot be interdicted because the government does not employ them. Accordingly, they are often willing to resolve such disputes as part of their customary responsibility to enforce and protect the community and the community's customs. The oathing ceremonies that precede the FGM process and the high level of respect accorded to elders often mean that many participants would be unwilling to speak against them before the police or court for fear of curses.

Disputes around FGM often result from situations where one parent is willing to subject the children to FGM while the other does not. Often it is the mothers who resist FGM. Part of the reason is that civil society organizations that operate in the research area, such as FEMNET and World Vision have concentrated their anti-FGM efforts on creating awareness among women. However, this position is also contested by the civil society organizations who argue that they do not deliberately exclude men from the capacity building initiatives. Rather, men often fail to turn up whenever such forums are organised for them on the basis that FGM is a women's issue. Even when they turn up, they are generally uncooperative and are, according to one NGO official interviewed, only 'quick to claim daily allowances'. Accordingly, women are generally more aware of the dangers of FGM. Despite this reality, women still lack decision making voices at the family level and therefore cannot make a final choice over whether their daughters should undergo FGM or not. Any attempt at resisting FGM often results in a family conflict that often attracts (or requires) the intervention of the elders. In other instances, it leads to domestic violence or separation.

Another area where chiefs largely shift the dispute resolution sessions is in the cases of children in conflict with the law and children disputes that require *Keeturum saandet*. As will be noted in later chapters, communities prefer having children cases determined at the community level. Accordingly, chiefs often refer the cases of repeat offenders to VCOs for counselling just like the VCOs sometimes refer (or threaten to refer) 'stubborn' children to the chief for corporal punishment. This is because child justice among the Kipsigis requires that the parent be informed of the child's offence and the possible consequences of the same, especially in view of the harsh reality that would face such a child if his/her case was to end up in court or before the Children officer. Since chiefs are not trained on children matters especially on issues related to rehabilitation schools or borstal institutions (where most children who are deemed as 'stubborn' or delinquent usually end up), they often refer such matters to the VCO. Asked about the cross-referral to the VCO, the Kaptengecha assistant chief observed that:

> When a child is stubborn and there are chances that he may end up being reported to the chief then to police and later to an approved school, we call in the VCO because they know more about children matters, so they will tell the child and parents about the

consequences of approved schools. Sometimes we also work with them in cases of child maintenance especially in writing agreements for stubborn parents.

Keeturum saandet refers to the process through which a woman who has a child outside wedlock and the child (or children) are cleansed before they are accepted by the husband. In many family disputes, the status of the children born outside wedlock is usually a thorny issue. Whereas the chief can resolve the matters that led to the separation or extramarital affair through mediation, the child cannot be accepted back into the family (or community) unless they undergo the process of *Keeturum saandet*. Once the process is complete, the child completely loses any connection with his/her biological father and adopts the identity and family of their 'adoptive' father. Under customary law, the permanent legal attachment between the biological father and the child is completely extinguished by the ceremony. No claim can, therefore, be brought against the biological father for maintenance, notwithstanding the position of the Children's Act, 2011 which establishes a permanent link between the biological father and the child, and therefore leaves open the possibility of access, maintenance even custody claims, regardless of the marital status of the mother (and the father). At the same time, the biological father cannot assert any claim on the child after the ceremony, regardless of the legal position of state law.

Keeturum saandet ceremony cannot be conducted by the chief because either; he is not considered to have the customary status to do it, belongs to a clan that ordinarily is not allowed to conduct ceremonies, underwent a non-customary process (such as civil or Christian marriage) or is too young. Accordingly, the chief has to refer such cases to the elders who after resolving the dispute would select one of them or a third person to conduct the ceremony. The ceremony was also a condition for the forgiveness of an adulterous wife. Chiefs also largely referred cases of *Keepet lool* or *Kiilgee* (traditional divorce ceremonies) to the elders.

Forum shifting was found to be enmeshed within inter-systemic forum shopping in which formal justice systems such as children courts would shift the responsibility of dispute resolution to the elders and chiefs. According to the children's magistrates interviewed in this research, the difference in conceptions of justice, coupled with unique socio-economic realities and the influence of customary law sometimes compels them to refer cases to the elders and chiefs. Upon resolution of these cases by the informal justice systems, a report is usually submitted to the court and if all the parties are satisfied with the decisions of the elders, it is adopted as the order of the court. This approach, it is argued, promotes sustainable dispute resolution as it ensures that court orders are consistent with local realities. One challenge with it though is that sometimes elders and chiefs arrive at decisions which in the eyes of the court may be manifestly unjust, unconstitutional or illegal compelling courts to substitute them with 'correct' orders. This is process is usually problematic especially in cases where the parties are satisfied with the 'illegal or unjust' decisions of the elders and chiefs.

Forum shifting was found to be predominant even among formal child protection agencies. It is important to note that the formal child protection agencies in Kenya are anchored upon the principles of child protection, child justice, and prevention of child separation from family. Accordingly, the children officers are expected to protect children from family separation by ensuring that children continue to live within the umbrella of the family. This responsibility essentially requires them to resolve family disputes, a task which is impossible under the existing formal legal framework as their intervention in such matters is limited to the protection

of children's interest, which in practice is framed as either child custody or maintenance. The Children Officers interviewed in this research, therefore, observed that the legal framework under which they operate is in some way inconsistent with the aspirations of the state with regard to child well-being. To effectively achieve this aspiration, Children Officers are often compelled to either refer (shift) cases to the IJS or ask for their opinion before disposing of cases, especially if family conflict lies at the centre of the children's matter. Accordingly, there are children matters that are addressed by the children offices purely based on customary law so that the customary law position is reflected in the parental agreements issued by the children office to the disputing parents. The Children's Officers interviewed in this study admitted that since IJS focuses on family unity as a way of guaranteeing child well-being they stand at a better advantage in guaranteeing child well-being and even rights compared to the formal agencies. The Kipkelion Children Officer observes:

> Sometimes parties do not have the money to pursue their cases through the courts so we divert these cases to the community. One advantage of this is that community dispute resolvers like chiefs and elders usually have a deeper understanding of the dispute in the family. Sometimes these disputes revolve around provision for the family, use of alcohol etc. They know all these. In fact, I remember referring a case to the pastor because the issues bordered on religious matters, although these affected children too… After referring them, they give us a report. We have to know what they discussed the course of the problem and the resolution. That is why we have this file to keep those records. We want to know the mechanisms that have been put in place to protect the children. As you can see, our work here is to protect children from separation from the family, protect them from abuse, neglect and FGM. The easiest way to protect them from separation from family is through chiefs and elders.

Due to the perceived inconsistency between the interest of the child and that of the parents, Children Officers who refer cases to the chief often send Social Welfare Officers (primarily interns or volunteers) to ensure that the interest of the child is protected during the dispute resolution sessions. This is because of the general feeling among government officers that IJS often focus on family unity at the expense of the children.

4.5.5 Shopping forums

Forum shopping among the Kipsigis was also characterised by what Keebet von Beckmann calls shopping forum, a situation where dispute resolution systems seek relevance by soliciting for disputes as a way of raising their profile among the community members. Resolving (or appearing to resolve) high profile disputes or addressing a big number of disputes often implies that the institution is highly approved by the community. Such approval is then used by the dispute resolution institutions to raise their status and entrench their political relevance.

Infiltration of informal justice systems, especially the *Myoot* and *Ololmasani* by politicians was noted in the study. Since the data collection was conducted in an electioneering period, the researcher observed that to a large extent, dispute resolution sessions by the two Councils were often attended by politicians or their representatives who would often request for an opportunity to address the gathering after the process. Part of the reason was that the dispute resolution process by its very nature attracted many people who would be the subject of the political campaigns by the politician or his/her representative. Since politicians often gave money to

attendees, their presence often implied that many people would attend the sessions. At the same time, the formalization of the councils, through for instance registration by the government, made it easy for politicians to infiltrate them as they could easily identify the leadership and even influence future elections of the council's leaders.

The elders, especially those of *Myoot* and *Olomasani* councils have massive influence and following in their community. They, therefore, use this influence to install people as community elders or spokesmen, bless, curse or anoint specific people as the preferred candidate of the community during national elections. These installations often lead to conflicts within and between the councils, as members rarely agree on whether the anointed person actually meets the standards of an elder or spokesman under Kipsigis customary law. At the same time, questions have been asked over the customary foundation of the positions into which people are anointed since some positions such as the position of Kipsigis spokesman, did not exist before, and is therefore considered a customary invention of (some of) the elders. Similarly, the Kipsigis consider *Kapkatet* ground to be the traditional site of installing leaders so that any installation done outside this ground is considered as invalid.

Fig 10. Isaac Ruto, the former Bomet Governor, being installed as the spokesman of the Kipsigis community by the Kipsigis Clans Association.

Since dispute resolution forms the foundation of their existence, the *Myoot and Olomasani* elders use disputes as a means of self-preservation. This commodification of dispute resolution has resulted into inter and intra-council rivalries in which one set of elders disputes either the customary composition of the other or the power of the other group to decide matters of the community. For instance, the Kipsigis Clans Association, that installed Mr. Isaac Ruto as the spokesman of the Kipsigis community, has been dismissed by *Myoot Council* as lacking the legitimacy to do the installation or speak on behalf of the community.

The Councils are also characterised by leadership rivalry as leadership positions often attract more politicians and therefore more money. Local governors are increasingly using the *Myoot* and *Ololmansani* elders to legitimize their leadership and pacify opposing clans within the Kipsigis community. For instance in a bid to attract the support of the Kipsigis community, who command a sizeable voting bloc in Narok County (that is predominantly inhabited by the Maasai), the Narok governor financed the building of the Ololmasani elders meeting house at Olchobosei hills and had his campaign pictures hung in the house, an issue that has split the council almost through the middle.

Fig 11. *Ololomasani* elders inside their meeting hall in Olchobosei. On the far right corner are campaign posters of the local governor who funded the building of the hall.

Some elders argue that as a non-Kipsigis and young member of the Maasai community, the governor's picture should not be hung on the wall as this desecrates the place while others argue that customary law requires them to sit under the trees at the historical hill and not in the modern building. A third group is firmly in support of the governor's initiative noting that to the extent that the building of the house was supervised by elders and to the extent that it is located at the very point where they used to sit, the customary requirements have been met. This differences perhaps highlight the contested nature of customary law and the pressure that modernization continues to effect on customary law and customary institutions.

4.6 Summary

The institutions of the chief and elders are still very popular dispute resolution systems among the Kipsigis. They not only address disputes arising out of the violation of Kipsigis customary law but are also crucial in addressing matters concerning state law. To this end, formal child rights protection agencies like children officers and courts often work with them to protect the interests of children. The elders and chiefs have well-structured dispute resolution procedures that are tailored to resolve the disputes without antagonizing family power structures. On one

hand, this approach is good because it helps to holistically address the underlying causes of a conflict, without apportioning blame on anyone. On the other hand, they are problematic because they perpetuate and reinforce power inequalities that sit at the centre of the oppression of women and children at the family level. The tense relationship between state law and customary law, especially on what constitutes the well-being of children has led to rivalry between VCOs and chiefs, with each one claiming to have the legitimate authority over children matters at the community level. These rivalries have to a great extent led to (re) negotiation of customary law in a way that has facilitated its growth and development but also compromised the efficiency and effectiveness of locational and sub-locational Area Advisory Councils (AACs).

Due to the relative advantage that comes from using one dispute resolution agency over the other, community members often engage in forum shopping across the various institutions. This has to a great extent checked the excesses of the dispute resolution platforms as they know that their decisions will be appealed and possibly overturned by the other forums if found to be unjust or in violation of customary law. The following chapter explores how these institutions respond to the question of the best interest of the child in view of their overlapping functions and operations within the context of customary law.

As noted above, the conception of what constitutes child justice across the formal and informal justice systems, as well as within each forum often varies. Since parties often have their own conceptions of what constitutes the best interest of their children either based on state conception of best interest, customary conception of best interest or both, they often forum shop across the various dispute resolution avenues in a bid to obtain suitable justice for their children in line with their own conceptions of child justice and interest. Having discussed the pursuit of child justice across the various dispute resolution platforms, the following chapter will explore the conception of child well-being within the ethics of care and virtues under Kipsigis customary law, the tensions that emerge when children attempt to undermine the customary conception of care in favour of rights and the reaction of informal justice systems to these tensions.

CHAPTER 5

Informal justice systems and the (re)casting of children well-being within the ethics of care and customary moral virtues. Exploring the Kipsigis rejection of (children) rights talk

5.1 Introduction

A key objective of this research is to observe how children rights are manifested in and protected by informal dispute resolution processes among the Kipsigis. The previous chapter partly explored this question by examining the nature and normative structure of the informal justice systems among the Kipsigis. This chapter builds on these findings and their analysis to examine how informal justice systems utilize the customary language of care and virtues to address the challenges facing boys and girls and the extent to which this approach has succeeded or failed in the children empowerment process.

Section one of this chapter explores the consideration of care as a customary virtue among the Kipsigis. It also explores how reciprocal care ethics is woven into the cultural infrastructure of the Kipsigis and how the decisions of parents and other members of the Kipsigis clans and families are anchored on care as well as the extent to which the performance of care roles raises or diminishes one's status among the Kipsigis. This section equally highlights the extent to which informal justice systems base their decisions on the principles of care and the attempt by the Kipsigis community to enforce care obligations. Section three examines how care ethics informs traditional adoption of orphans and vulnerable children among Kipsigis families and the way in which such adoptions could be jeopardised by the failure by the 'adopter' to fulfill care responsibilities within the family context. The last section explores the tensions that exist between the rights language and the language of care and virtues that are dominant at the family and Kipsigis community level.

As discussed in chapter three, this study locates care ethics within Ignatieff's conception of ordinary virtues and explores how the same is manifested in child caring relationships.

5.2 Informal justice systems, ethics of care and child well-being among the Kipsigis

5.2.1 Care as a customary moral virtue among the Kipsigis

As highlighted in chapter three, most care ethicists observe that care deals with what is above and beyond the floor of legal duty. In other words, caring obligations go beyond the standards set by the law and rights.[257] This position however flies in the face of Kipsigis reality where customary virtues anchor the duty of care either because legal language with its focus on rights and justice generates unenforceable entitlements since they ignore the nature of the relationships between the caregiver and care receiver, or because the language of state law and justice focus on autonomy and liberty- doctrines which are foreign to the Kipsigis

[257] Virginia Held, 'The Meshing of Care and Justice'(1995) 10 (2) Hypatia 128

understanding of well-being.[258] Accordingly, legally sanctioned duties of care are enforceable only through coercion by the police, children officers and children courts while the same are either not recognised or not appreciated by local customary structures such as informal justice systems and community members.

My argument is that there is still little understanding of how care relationships are constructed through customary structures and how customary law at the community level generates and enhances care relationships. At the same time, the interaction between the language of customary care ethics, propagated by informal justice systems and members of the Kipsigis community on one hand and the language of rights and justice propagated by formal child protection institutions such as children officers and children courts on the other, has created a symbiotic relationship between the two systems in such a way that one is incomplete without the other, especially in the guarantee of child well-being.

It has long been argued by scholars like Tong that rights are too instrumental for vulnerable populations not only because they presume abstract equality, which is often absent in most social interactions such as those among the Kipsigis, but also because they ignore compassion which is an inherent element of well-being especially among vulnerable populations like children.[259] Accordingly, the argument is that children need more care than rights.[260] Fieldwork conducted during this study, however, revealed that the appeal to rights and care are activated at different spaces so that the child interacts with both doctrines depending on the nature of the need and the violation. As the chapter demonstrates, whereas cases of sexual violence against Kipsigis children were handled through formal justice processes (on the basis of the violation of legal rights), cases of child maintenance and custody as well as inheritance were mostly handled through informal justice processes (on the basis of care).[261] Informal justice systems were therefore perceived by the community to be able to restore caring relationships more than formal justice processes. Similarly, the language of rights was found to dominate discussions of well-being at school while that of care dominated the language of well-being at home.

This research has revealed that contrary to universalised notions of child well-being which are anchored in rights realization, children among the Kipsigis attain their well-being through a nuanced non-rights based approach that encompasses the ethics of care and the 'do no harm principle' as well as that of customary rights whose foundation and enforcement are different from universal notions of rights. Although children sometimes appeal to rights as discussed later in the chapter, and despite the fact that formal child protection agencies mostly rely on the rights language, **a**ppeal to universal rights generates ambivalent outcomes for the child.

It was further observed that that customary law creates obligations which act as a foundation for the language of care. In other words, care is not an entitlement that accrues simply because one is a human being, a member of the Kipsigis community or clan member. Rather, it is a provision that one obtains by fulfilling other customary virtues. Thus, care at the community level is both an outcome that one obtains for carrying out other customary virtues namely; reconciliation, forgiveness, reciprocity, responsibility, solidarity and unity and prerequisite for claiming care from others. Only those who fulfil their obligations of care to other members of

[258] This is extensively discussed in chapter four
[259] For such an argument see Tong, Rosemarie and Williams, Nancy, "Feminist Ethics", *The Stanford Encyclopedia of Philosophy* (Winter 2018 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2018/entries/feminism-ethics/>
[260] Ibid
[261] Participant observation

the Kipsigis community, in addition to the other customary virtues, are entitled to care from other members of the family or clan.[262]

The above principles of customary virtues are considered as binding to both children and adults. As opposed to the many theorists like Herring who argue that care is largely unenforceable and therefore incapable of guaranteeing the well-being of members of society, the study observed that care at the community level is enforced through informal justice systems and other customary structures.[263] Part of the reason is that care is enmeshed with customary law so that care obligations accrue from and reflect the position of Kipsigis customary law. However since care is less reflected in state law, formal justice systems find it difficult to enforce caring obligations as those with actual caring obligations under customary law may not be same individuals with caring obligations under state law while those with the obligations under state law may not have the necessary resources, social proximity and status to actualize their caring obligations. The assumption of state law that parents are the main caregivers with regards to their children sits very uncomfortable with Kipsigis customary law conceptions of customary virtues which extend caring responsibilities to other members of the society such as grandmothers, siblings, uncles and aunts.

At the same time caring at the community level as hinted above, is anchored in the fulfillment of certain responsibilities by the child including responsibilities of care. For instance, a Kipsigis child who fails the responsibility of respect for his parents and clan may lose his/her caring entitlements just as the one who fails to help his/her parents perform domestic duties.[264] Similarly, parental obligations such as payment of school fees may be waived by the poor performance of the child. Thus since many Kipsigis families have more children compared to their resources, the entitlement to school fees payment can be transferred from one child to the other based on academic performance, gender and performance of domestic responsibilities.

Since caring is mutual between the parent and the child, failure by the child to care for the parents often extinguishes the caring obligations of the parent towards the child so that withdrawal and conferral of care becomes a means of punishment or reprisal for an action or inaction of the child. For instance, denial of food or refusal to cater for certain needs of the child is considered as an acceptable punishment for child indiscipline or irresponsibility.[265]

In most cases, Kipsigis children are expected to help their parents work in the farms. Children who fail to give this help would have their caring entitlements withdrawn in favour of the other children who are more cooperative. This is because, in the face of resource scarcity, a rational calculation often has to be made with regard to education so that those children who fulfil their caring obligations, including the expectation to work and perform well in school often get more care and support compared to those who are considered as lazy and rebellious. Any attempt to reclaim the caring through appeal to children rights is often resented by the informal justice procedures.[266] Accordingly, apology, behaviour change and other forms of expressing remorse are considered as acceptable means of restoring the caring relationships between the child on one hand and the community and the parents on the other.

[262] Multiple interviews and participant observation.
[263] See Herring (n 21)
[264] Participant observation and multiple interviews
[265] Multiple interviews in Emurua Dikkir
[266] Participant observation

The tendency of the Kipsigis to tie care to the performance of certain duties by the child however works against the very principles of customary care since it ties care to individual capacity including academic capacities that not all children are endowed with. Thus as observed in chapter 5, a girl who finds herself within the domain of the formal justice system such as in borstal institution may face rejection upon her return home, thereby losing all her care entitlements.

Caring at the community level is thus not one way. Children are seen as forms of social insurance for old age. Thus parents under Kipsigis customary law, are expected to care for their children and guarantee their education in return for maintenance from the same children upon attaining adulthood.[267] A parent who fails to care for his children is therefore considered to be endangering his/her own welfare in old age. At the same time, children as beneficiaries of care are expected to reciprocate by caring for their parents and family members through helping them in domestic duties. At the same time, the children have a caring obligation towards each other. For instance, older Kipsigis children have a responsibly to help their siblings do homework in return for equivalent help from their parents or other members of the family. These caring responsibilities of children are captured as duties of children in the Children's Act, 2001 and the African Charter on the Rights and Welfare of the Child.[268] Thus although parents are expected by teachers to help their primary school children do homework, evidence from this study noted that the same is actually done by siblings. In some families, one secondary school child would help a number of children in the wider family do their homework.[269] Part of the reason is that although women are generally expected by Kipsigis culture to perform the main caring roles towards their children, including helping them do homework, most women in the study area, especially in Emurua Dikkir are either illiterate or only possess basic literacy skills.[270] Failing to help siblings or other children from the wider family do their homework was considered as a dereliction of duty of care towards other children and therefore socially disapproved.

Although the state attempts to shape the interaction between children and their parents on the basis of rights, fieldwork conducted during this research indicated that neither rights nor justice seems to inform this interaction among the Kipsigis. Parents largely feel obligated to provide for their children due to a feeling of compassion and care rather than rights. Accordingly, children are considered to have a role to play in their own care by helping their parents, primarily mothers, perform domestic duties.[271]

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[267] Multiple interviews with elders

[268] See s 21 of the Children's Act, 2001 and art 31 of the African Charter on the Rights and Welfare of the Child.

[269] Interview with parents in Emurua Dikkir

[270] Government statistics indicate that 69% of women in Narok County (in which Emurua Dikkir Sub County lies) are illiterate compared to 31% of men. For details see Narok County Government, *HIV Aids Strategic Plan-2014-2019* accessed from *https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKEwjC6Iv0g_ffAhUP8xQKHclXCDsQFjABegQICBAC&url=https%3A%2F%2Fnacc.or.ke%2F%3Fmdocs-file%3D3781%26mdocs-url%3Dfalse&usg=AOvVaw16YRKEsmEbjpuNTAoVL6Xr*

[271] Participant observation

5.2.2 Care ethics under informal justice systems

As highlighted above, the protection of child well-being among the Kipsigis is located within a caring relationship. Accordingly, parents are not only seen as possessing rights over their children but also as having a caring obligation towards them. This duty of care is understood either as the provision of basic needs like food, health, education and guidance or as proper upbringing in line with communal standards of expected behaviour. Thus when a child is found guilty of an offence by chiefs and elders, the blame does not only go to the child but also to the parents for failing their caring roles. Accordingly, informal justice systems mete out punishment on the child for the crime and on the parent for neglecting their caring obligation. This translates to corporal punishment for the child and a fine on the parent. This fine is often given to the elders, with additional money, livestock or grains given as compensation to the victim of the child's offence.

As reflected the widely held African adage that 'it takes a village to grow a child' Kipsigis clan members are perceived to have a caring responsibility towards the children in the community as a means of guaranteeing the continuity of the clan. For instance, clan members would often be called in to fundraise for a child whose parents are not able to pay his/her school fees. The same applies to young men who lack enough cattle to pay bride price. Community care obligations are equally activated when a member of the clan murders a member of another clan. When this happens, state law reacts by having the murderer arrested, prosecuted and imprisoned.[272] However, at the same time, the clan members have to demonstrate their care for the suspect not only by organizing his cleansing ceremony but also by donating cattle to be given to the family of the deceased as compensation. During the cleansing ceremony, which is often undertaken by elders, a goat is slaughtered and tied on top of a tree. The murderer is then required to lie under the tree and have the goat's blood drip on his back. Such a ceremony especially happens in instances where the suspect is acquitted by court or just before he is arrested.[273]

Before the murderer undergoes the cleansing ceremonies, s/he is not allowed to have direct physical contact with other people. Accordingly, s/he must stay out in the forest or farm until the process is done.[274] All his food and other supplies are brought to the forest/farm by a family member who should however not have any physical contact with him as this would transfer the evil spirit of the dead man back to the family.[275] This happens both in cases of murder and manslaughter since this distinction is blurred at the community level. At the same time, this process was independent of age so that both child and adult murderers are subjected to the same process. The process is meant to reintegrate the individual back to the community and to appease the spirit of the ancestors who are presumed to be offended by the murderer.[276] Accordingly clan members, as part of their obligations to the murderer, have to organize the

[272] Although the Penal Code prescribes death sentence for murderers, there practice has been under a moratorium since 1987. However the issue remains contested. In 2017, the Supreme Court of Kenya ruled that mandatory death sentence as prescribed in section 204 of the penal code, without allowing courts' discretion is unconstitutional. For details see Francis Karioko Muruatetu & another v Republic [2017] eKLR

[273]Discussion with Ololmasani council of elders. In the eyes of the community, acquittal by court does not shield one from the customary cleansing processes.

[274] *Kokwet* elders in Mogogosiek -Bomet

[275] Ibid

[276] Ibid

above processes.[277] Thus the caring relationship between a person and his clan is so strong that not even criminal prosecution under state law or cleansing under customary law can break it. As seen above, the caring obligation towards a murderer continues even during his stay in the forest and away from home and this explains why family members are expected to feed him and give him blankets and other supplies during the whole cleansing process.[278] However, a murderer who has previously failed to fulfil his caring obligations just like a parent who did not contribute to previous school fees needs of other children in the clan loses the care entitlements for his own children and often has to face his care challenge alone. This scenario, in which the caring duties that clan members have towards the child are partly dependent on the actions or inactions of the child, parents or guardian, has been a downside of the community based customary care system. At the same time, its reciprocal nature acts as an obligation generating process that elicits compliance.

The caring responsibilities that clan members have over children shifts across the Kipsigis family lineage based on consanguinity.[279] Thus the duty to care for children primary falls on the parents of the child. The mothers have a caring obligation at the household level while the father is primarily tasked with physical care (security) and providing for the family. However in case of their absence, death, extreme poverty or incapacity, the obligation to care shifts to the co-wives, and grandparents.[280] Such an obligation is equally transferred to the uncles and aunts in a transcending manner depending on the availability of capacity of the co-wife to carry out the caring roles.

Since it is deeply entrenched, care ethics seems to infiltrate all socio-legal arenas among the Kipsigis. Thus even legally regulated relationships, such as those between chiefs and children or Volunteer Children Officers (VCO) and children seem to be more regulated by care rather than rights, law and justice. For instance, when children commit offences at home, they often run to the chief or VCO to seek protection from corporal punishment from their parents or guardians. The chiefs and VCOs often hold them over and have them sleep and eat with their children before intervening in the matter the following day. Thus although the law does not mandate the chiefs and VCOs to provide accommodation for such children, their identity as members of the Kipsigis community creates caring obligations which justify the provision of accommodation and food for such children. Such a practice reflects what Fernanda Pirie calls a 'system of obligations.'[281]

According to Pirie, such a system creates law, order and definite privileges which function in the absence of authority, government and punishment.[282] Since the state neither pays the VCOs nor chiefs for staying with such children nor envisions this scenario, VCOs and chiefs have to appeal to the customary language of care to justify their caring obligation towards such children. To paraphrase the words of Barbara Oomen, chiefs and VCOs homes act as temporary community level 'cities of refuge' for children who are running away from domestic violence or corporal punishment.

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[277] According to the elders, the nature and circumstances of the murder determined the clan's intervention. The clan was generally more willing to intervene in cases of man slaughter than in cases of premeditated murders.
[278] Conversation with *Ololmasani* elders
[279] Multiple interviews in Kericho
[280] Ibid
[281] Fernanda Pirie, *The Anthropology of Law* (Oxford University Press 2013)
[282] Ibid 26

Within this context, it can be argued that customary law is largely based on care ethics, at least with regard to the protection and upbringing of children. These caring obligations are not limited to blood relationships but to community and clan associations. A child, therefore, gains caring duties from the chief or VCO by his membership of the clan or community. The homes of VCOs and chiefs also act as centres where lost children can be accommodated until their parents or other relatives are found. One VCO in Sigor, Bomet County explains:

> Even when people pick abandoned children, they bring them to my home and I have to take care of them well. This way they are able to tell me where they come from and I can trace their parents. Sometimes when they are too young and cannot speak properly, I can ask for their names, since some names are associated with some clans, I can easily tell the clans from where they come and this way I can trace their parents. However this process takes a long time and during all this time, the child would be staying with me. I think the government should build a rescue centre in this area. I have land which I can give out for the building….Even when you come to my home, you will find them playing with my children. Usually, I tell my children to be keen on what they say as they play. Sometimes you will hear them mention the names of their sisters, brothers or other playmates, or even school, this way, you are able to infer where they come from.

Children transfer their domestic perceptions of care to the public sphere and in this regard consider the female chiefs and VCOs to be generally more caring and receptive. Thus whereas there are both female and male chiefs and VCOs, children mostly ran to female chiefs or VCOs that they fondly call *mama watoto* (the mother of children).[283] However, according to most female chiefs and VCOs, this reality possess a problem within their families as they have unequal power relations and often have to seek permission from their husbands to have the child spend time in their homes. Occasionally their husbands refuse and they have to visit the home of the child to have the matter resolved even in the middle of the night. This challenge is much more pronounced with regards to lost children who in such scenarios, have to be transferred to the Children Officers who unlike VCOs are often unwilling to even temporarily house the children and thus immediately transfer them to the Children's homes.[284] This transfer of children to children's homes is highly resented by the chiefs and VCOs who observe that reuniting such children with their parents after their transfer to the children homes is not only tedious but also highly bureaucratic. In some instances, such children are put up for adoption or transferred across different children homes thus making the reunion process even more cumbersome.[285]

The question of care ethics as underpinning the well-being of children is well reflected in the cases of teenage mothers. In many instances, teenage mothers often leave their children with their parents or other relatives and return to school.[286] The parents and relatives are therefore obligated to care for this child not on the basis of any legal obligation but purely on the basis of care relationships. They have a caring relationship with the teenage mother as well as a caring relationship with the baby by virtue of her/his membership in the clan. Thus the failure of the

[283] Multiple conversation with VCOs. It is noteworthy that although they exist, male VCOs do not have the male equivalent -*baba watoto*, (the father of children) but are generally referenced as the fathers of their specific children, the sons of their parents or by their actual names.
[284] Interview with VCOs, Kipkelion- Kericho
[285] Interview with VCO, Sigor-Bomet
[286] Conversation with a teenage mother in Emurua Dikkir

return to school policy, a government initiative aimed at having school going teenage mothers get back to school after giving birth, can largely be blamed on the failure of the state to appreciate the potential role of care ethics in guaranteeing the well-being of both the teenage mother and her baby. In other words, the state's focus on the girl without any reference to the parents and relatives ignores the potential role of care ethics in actualizing the return to school policy by providing the necessary social and welfare support to the teenage mother and her baby.

Care ethics is also reflected in divorce and separation cases at the customary level. As noted earlier, Kipsigis customs requires a woman, after divorce or separation, to leave with all the children and allow them to return to the father upon attaining maturity.[287] This especially applies to male children. This customary right of return is based upon the principles of inheritance and continuity of the lineage. Male children are specifically encouraged to return because as a patriarchal community, male Kipsigis children can only inherit from the father's side.[288] However, some elders were generally sceptical about this return arguing that it is a strategy that the women use to reclaim land way after they had left their husband.[289] They noted that a woman would leave her husband, stay away for a number of years then claim to return the male children to inherit land in line with customary law.[290] Since the boys would sometimes be too young to live alone, their mother would have to be accommodated on her original land (or another piece of land) to provide care for them. Sometimes this involved building a new house for her in instances where the original house had been demolished. It is partly for this reason that the boys were valued over the girls. The caring duties of the clan towards the boys thus seem to transcend the disagreement between the two parents and is equally premised on the future potential of the boys to care for the clan members.[291]

However, there are instances where women opt to leave the children with their father as they are considered as an economic burden and a source of stigma to the divorced or separated mother. When this happens, the children are often moved to their grandmother's house or to the house of one of their uncles who is married. The idea is that women are presumed to be better suited to care for the children, including children who are not biologically theirs.[292] At the same time since the caring relationship already existed between the children and the members of their wider family, the exit of their mother simply reifies this relationship to guarantee their well-being. Within this context, the language of rights is basically non-existent and undesirable.

In some instances, the considerations over care often go against the very interest of the Kipsigis child by making it difficult to address the underlying causes of child abuse. This is because the relationship between the child and the parent is considered to be that of care so that a parent's deviation from the same into harm is minimised or considered to be accidental and therefore rectifiable.[293] Thus a parent's harm to the child, such as cases of child assault, is considered to be in the wider interest of care and correction. Accordingly, there is less impetus to punish or report the parent to the police. Reporting such parents to the police is considered to be

[287] Multiple conversations with elders in Bomet
[288] Ibid
[289] Conversation with Kokwet elders in Emurua Dikkir.
[290] Ibid
[291] Conversation with elders in Kericho
[292] Multiple interviews with elders
[293] Reflection from participant observation

undesirable for the welfare of the child since it would remove the parent from home into a police cell and make the child suffer as the parent, although abusive, maybe the main care provider to the abused child and other children.[294] The absence of any state protection framework for children whose parents are arrested often makes it unlikely that their cases will be referred to formal justice systems by the community or players in the informal justice processes. Neighbours and relatives fearing the transfer of the children's care obligations to them, are also unlikely to report such cases to the police.[295] Informal justice systems are preferred in such cases because they retain the parent within the context of the home and maintain the caring relationship between the child and the parent. One police officer in Emurua Dikkir explains:

> I remember last week we arrested a woman together with her husband for beating up their son who had stolen two *sufurias*[296] and sold them to scrap metal dealers. The boy had been beaten so severely that he got hospitalised. The doctors called us to report the case and we arrested both parents. However, we could not charge them because the chief and other family members came here to request that we allow them to resolve the case at home. They said that the children were suffering. So we referred the case to them. The boy has now recovered and he is back home living with the parents.

Asked whether he followed up on the outcome, the police officer noted that they had called the chief who told them that they met at the elders' *baraza* and that they had warned the parents against such kind of assault on the child.

As observed above, the presumed caring relationship between the children and the parents often makes it less likely that legal action will be taken against parents even if they abuse their children. This is because such abuse is considered to be part and parcel of a broad-based caring approach. In the words of one of the parents interviewed, 'sometimes parents get harsh on children or even beat them not because they hate them but because they care for their future.'[297]

As highlighted earlier, in Kipsigis customary law and indeed in many customs, parents and children are expected to have mutual caring relationships. At the beginning of the child's life, a parent has almost a one-way caring relationships with the child in which the parent is the giver of care and the child is the receiver of the same. However, as the child matures s/he gains caring responsibilities towards the parent. In the end, the caring obligation shifts so that the child now becomes the one-way caregiver while the parent becomes the one-way care receiver. In fact, when they are very old, Kipsigis parents are even allowed to move into the houses of their last born sons since they may not be able to take care of themselves.[298] Failure to observe the caring relationships is considered as a violation of customs and therefore sanctioned. Jane's case perhaps illustrates this reality:

> Jane, a widow had breast cancer. At the same time, she had a son who had dropped out of secondary school due to alcoholism. On the fateful date, the son came home after his drinking, found no food and slapped his mother for not preparing food. Jane reported the matter to the police who insisted that they would only carry out arrests after recording

[294] Interview with assistant chief, Mogor location-Emurua Dikkir.
[295] Interview with VCO, Kapsosian-Emurua Dikkir.
[296] Aluminium cooking pots
[297] Interview with parents in Sigor, Bomet county
[298] Interview with elders in Kaplong, Bomet

> witness statements. However, all the family members and neighbours refused to record statements noting that the matter should be resolved at home and not in public. Accordingly, the police refused to intervene in the matter and Jane had to report the same to the chief. Upon hearing, it was decided that: The son would be subjected to corporal punishment, apologise to the clan and the mother and undergo *kitilil*, a cleansing process since what he had done was taboo. It was also held that he had to stop his drinking habits and that moving forward, he had to work and feed his mother who was old and sick.[299]

According to the elders the son had not only committed an offence by beating his mother but had also failed his caring responsibilities towards her since she was sick and incapable of providing both for him and for herself. The role of the elders, therefore, went beyond retributive actions, such as corporal punishment and restraining actions such as restriction from more alcoholism into enforcement of caring responsibilities. This observation confirms Nodding's argument that normative standards of enforcement may be applicable to enforce care if the person who is expected to care fails to do it voluntarily.[300] Although they refused to appear before the police, the family members were very willing to appear and speak before the chiefs and elders. They were urged to overseas the caring of the old woman by her son while the elders would ensure that the *kitilil* process was done.

My findings demonstrated that cases of neglect of caring duties varied across the study area depending on the socio-economic status of the location. Thus in Kericho and Bomet counties, most cases of parents who had been accused of neglecting care roles before the *Kokwet* elders and chiefs were brought by women against their husbands. However, in Emurua Dikkir, cases of elders claiming neglect by their 'grown-up children' who worked within or without the sub-county were very common. Part of the reason is that since Emurua Dikkir is a more conservative region, most parents were of the view that their 'grown-up children' had a justifiable customary obligation to maintain them, an issue that was less pronounced in the less conservative parts of Kipsigis land such as Kericho and Bomet where the elderly rarely claimed maintenance from their children through the chiefs and *Kokwet* elders. The demand for maintenance by elderly people emerged from the location of childcare as a future investment for parents. Accordingly, children are expected to reciprocate the care they received at childhood by caring for their elderly parents and grandparents.[301] According to the elders, failing to care for one's parents attracts a lifetime curse which can only be lifted through cleansing and resumption of care. One chief in Emurua Dikkir opines:

> So picture a child like you. Your parents took care of you, paid your school fees and bought you clothes. Now when they are old you refuse to take care of them! If such a case comes to us, we call you before us and if you refuse we curse you. And you know our curses are very lethal…. Even when you are poor you must share the little that you have with your parents because they shared the little that they had with you.

Caring responsibilities often extend beyond the level of the individual so that if one person has a dispute with another person, the dispute is considered as a threat to the relationship between the two families and therefore a threat to mutual reciprocal care. As part of their caring

[299] Case in Mogogosiek-Bomet
[300] See Nel Noddings cited in Maureen Sander-Staudt , 'Care Ethics' *Internet Encyclopaedia of Philosophy* (n.d) accessed from https://www.iep.utm.edu/care-eth/#SH1b
[301] Discussion with elders in Emurua Dikkir

obligations towards the individual, the 'senior' family members would attend all hearings concerning the individuals in cases where an individual appears before formal or informal justice systems.[302] Failing to attend would often mean either that the missing senior member is happy about the 'misfortune' of the family member or that he does not care about the misfortune. As Tronto observes[303], caring at the community level goes beyond caring for, as in Jane's case above, to caring about in which case community members are expected to show solidarity with the accused person.

Cases of child maintenance largely dominated most chiefs/elders sessions concerning children and care. In most instances, women would report to the chiefs and or elders citing neglect by the husband.[304] Although state law (specifically the Children's Act, 2001) fashions this as child neglect, such a conception does not exist in customary law. Instead the same is fashioned as 'family neglect' so that both the woman and the children are entitled to care by the husband. However, the concept of 'family neglect' is absent in state law due to its focus on autonomy. The actual care of the children is done by the woman but the provision of basic supplies and livelihood including physical security is considered as a form of care and is the responsibility of the man. The chiefs and elders often enforce this caring responsibility by ensuring that a man who works away from home at least takes time off to visit the family and provide for them. Thus whereas state law creates a legal obligation for both parents to care for children on an equal basis, such an obligation is highly gendered under customary law. Within this context, the obligation of the Kipsigis woman under customary law is to perform reproductive caring roles while the father's role is to perform productive caring roles and provide the basic needs to the whole family. However, these gendered roles are changing with the women increasingly performing the productive caring roles, by working in tea plantations to get income for the family, and reproductive caring roles, by doing household duties such as cooking for the children. According to the chiefs, increased alcoholism coupled with the fact that many men often work far away from home has resulted into many men abdicating their caring responsibilities to the women who are then expected to perform dual roles.[305]

Thus customary structures do not enforce any identifiable child rights at least as conceived in the Children's Act, 2001 and Constitution.[306] Instead, they enforce caring obligations. Their main concern is to compel the parent to fulfill caring duties rather than any particular set of rights owed to the child. This is because in Kipsigis *lingua franca* the language of child rights is only limited to customarily generated entitlements which are themselves anchored on the ethics of care. The well-being of children is largely dependent on good parenting which is based upon customary morality and care rather than on legal rights.[307]

Customary structures and players appreciate the fact that poverty may sometimes compromise the caring obligation of parents towards their children so that cases of child neglect are resolved partly by enforcing the parent's caring obligations and partly by ameliorating the underlying factors behind the failure to fulfill caring roles. Picture Joseph's scenario:

> Joseph was an alcoholic who was very poor and could not take care of his children and on several occasions, his wife reported him to the elders to have him provide. However, things

[302] Multiple conversations with elders
[303] For a detailed discussion on the types of care see Tronto (n 22) 142-143
[304] Participant observation
[305] Assistant chief-Kaptengecha Bomet
[306] See ss 3-19 of the Children's Act for a list of rights, cf art 53 of the Constitution.
[307] Observation from multiple cases

did not change and the children were now on the verge of dropping out of school. After failing to get help from the elders, the wife reported to the chief. The chief summoned Joseph and his parents who agreed to give the family two dairy cows. The idea was that the wife would milk the cows, sell the milk in the nearby market and cater for the children. However, it did not take long before Joseph sold the two cows and bought two smaller ones. The wife went back to the chief to complain and Joseph was warned against doing that again. However, within a few months, he sold the two small cows too. Upon realizing this, the wife abandoned the family and went back to her maternal home. The children then had to be placed with the grandmother as the chief and elders sought a lasting solution to the problem.

The research further revealed that the exercise of care roles to the Kipsigis child is gendered so that caring for the girl ceases much earlier than for the boy. What remains for the girl (upon cessation of parental care) is what Tronto calls 'caring about' in which the parents, upon the girl getting married, transform their 'caring for' into what Tronto considers to be 'caring about.'[308] In this context, the Kipsigis parents feel compassionate and concerned about the plight of their married girl but do not often undertake any caring roles towards her except in cases of dispute with her spouse where they come in to participate in the informal dispute resolution process. However, caring roles may be re-activated if the girl separates or divorces. In such instances, the parents would give her a piece of land to cultivate and feed the child (ren), not out of any strong rights obligation as positioned in state law but out of a duty of care and concern for her well-being and that of her children.[309] This caring obligation can equally be extinguished by the daughter's remarriage or reconciliation with her former husband.[310] To this end, caring for the girls appears to be strictly conditional and is thus premised on her continued stay at her parent's home and outside the marriage setting.

On the other hand, the caring roles that Kipsigis parents have towards the boys are less conditional and generally last longer. As such caring continues up to the point at which the boy gets married in which case parents often participate in the marriage process through the facilitation of bride price payment. Parents also socialize the daughter in law into the family and may contribute financially or otherwise in cases where the son is not able to effectively care for his family due to financial constraints.[311] However the same can be withdrawn if the boy does not behave according to the customary script. Consider Johns case in Abossi-Emurua Dikkir.

John was given a cow by his father on the basis that when he grows up he would use the cattle to pay bride price for his wife. The idea was that the cows would reproduce so that by the time John was mature, he would have enough cattle to pay as bride price. As a customary practice, his cow was to stay with the rest of the herd. However, John upon attaining marriage age opted to sell the cattle. He went to a butchery and received money from the butcher on the basis that he would deliver a cow. However, the father refused to have the cow given to the butcher on the basis that he had given it for bride price payment and not for sale. By this time, John had used part of the money given to him by the butcher. The butcher, therefore, moved to the chief to reclaim his money from John. Upon hearing, it was decided that John would return the remaining money and work in the butchery for the

[308] For details see Tronto (n 22)
[309] Conversation with elders in Kericho
[310] Discussion with Kokwet elders in Bomet county
[311] Conversation with elders in Kaptengecha, Bomet

equivalent amount of the used money since the father was adamant that he would never release any cow to John or the butcher.

Marriage is particularly revered among the Kipsigis due to its role in bringing in additional caring hands into the family. By custom, a daughter-in-law has a caring obligation towards the mother in law especially when she gets old. Her roles with regard to care thus increase with the age of the in-laws. Accordingly, she is not only seen to perform the caring duties on behalf of the son but also as a member of the family and clan. This is because upon marriage a Kipsigis girl is considered to have quit her clan and joined a new clan (the husband's clan).[312] Care obligations sometimes extend to the grandchildren who are equally expected to exercise caring duties towards their grandparents. Fulfillment of such duties is considered to be a prerequisite for blessings and inheritance by the grandparents upon their death. Thus despite the existence of the Constitution and the Social Assistance Act, 2013[313] which mandate the state to offer assistance to the elderly, this study observed that elderly people among the Kipsigis obtain their well-being through a customary mutually reciprocal relationship of care with their children, grandchildren and daughters in law.

The conception of the entire family as having the obligation to care sometimes creates problems both for the child and for the community. As noted earlier, it is considered as a violation of the duty of care among the Kipsigis to allow the child into the formal justice systems. Accordingly, it is believed that the care provided by the family and the clan cannot be replaced by any state institution. Thus all attempts are made to punish the child but retain him/her within the caring arrangement of the family and clan. One challenge with this system is that it elevates corporal punishment to a primary means of discipline and a form of care. In fact in the words of one parent in Bomet, the ''bible expects a parent who cares about a child to cane the child.''

Care also influences the dispute resolution process. According to the *Kokwet* elders, their care and concern for family unity often influence their decisions in family disputes.[314] Accordingly, they often go for those options that will resolve the dispute without compromising the integrity of the family. It is believed that caring for the family by extension, amounts to caring for the children. The following extract from a discussion with *Kokwet* elders in Kipkelion explains this reality:

> We often resolve cases in which the disagreement between the parents affects the children. You know many times the parents even go to the chief before coming here. However because we always try to unite people, we do not report to court, Children Officers or police. We just try to reconcile them.[315]

Asked about his view on family unity and harmony during the resolution of children's matters, the elder emphatically noted that reconciliation is key to their conflict resolution processes, adding that:

> When the mother and father reconcile and live together, the future of the children is guaranteed but when they go apart, the future of the children becomes bleak. Sometimes you realize that the disagreement is caused by a very small issue that

[312] Discussion with various groups of elders in Bomet
[313] See Social Assistance Act, 2013 ss 17, 21.Cf arts 43, 53 of the Constitution of Kenya accessible from http://www.kenyalaw.org/lex//actview.xql?actid=Const2010
[314] *Kokwet* elders in Kipkelion-Kericho
[315] *Kokwet* elder in Kipkelion-Kericho

> can be easily resolved. If you let the issue proceed to court or delay in resolving it, the man will marry a second woman very quickly and the small issue will now become complicated.

Thus as noted by Tronto, there is a sharp distinction between caring about and caring for. In the scenario above, it can be pointed out that the elders and chiefs care about family unity and the interest of the child in family dispute resolution, a situation which influences their decision. However, this care for family unity and children sometimes compromises the interest of the women. This is because although customary law allows for divorce, many requests for divorce are often rejected by the elders either on the basis that the children would suffer or because the family as an institution is so revered that actions that would negatively affect it are discouraged.[316] In one of the cases witnessed in Mogogosiek, Bomet County, a woman broke down in tears after her several attempts to divorce the husband on account of gender violence were rejected. At every juncture of reporting, the elders insisted that the marriage could still be saved because, under customary law, gender violence is not considered as a proper ground for divorce unless it is life-threatening. According to the elders, the man's lineage would disappear if the woman would be allowed to go with the children as their return was not assured and therefore in their view, the most acceptable action was to resolve the matter by admonishing the man to stop gender violence. [317]As at the time of the fieldwork, this did not seem to work as according to the woman 'she had lived a life of violence all her marriage life.'

Caring about is equally reflected in the attitude of the elders and chiefs towards children in conflict with the law. It appears from the fieldwork, that child delinquency does not completely erase the care relationships between him/her and the community so that the resentment against formal justice systems in favour of informal justice systems is partly anchored on the ethics of care. Asked why they do not refer children cases to court or other formal agencies, an elder in Embomos, Bomet wondered:

> How can you take a small child to the police? That is like dumping him into the sea. How do you expect him to face the judge in court? If facing us, who are always here with them, is a problem, how would they face a judge who is a complete stranger? Children matters must be finished at the community level. It is a big shame for an adult to stand as a complainant or witness in a child case. You can imagine somebody like me, with children and grandchildren, standing up to speak against a child, I cannot.

In his view, the presumed statutory distinction between Children's Court and other Court is non-existent for all courts are rigid, instrumental and therefore unsuitable for children. He ponders:

> In fact, if you see the way police handle these children you cannot like it. They just mix them up with adults. Sometimes the child is too young or even of school-going age and then you hear that they have thrown him to Kakamega.[318]

As noted above children staying within the community is considered both as a form of and opportunity for care. Accordingly, the communal resentment towards formal justice system is

[316] Conversation with multiple elders
[317] Ibid
[318] One of the most prominent borstal institution is in Kakamega County, about 180 Km from Bomet.

based upon their lack of care, an argument that is premised on their non-communal approaches to the rehabilitation of delinquent children and other disputes.

Having examined the manifestation of care ethics and its implications on the well-being of children, the following section explores how customary adoption, which is on customary law, is used to promote the well-being of orphans, neglected and vulnerable children. This discussion addresses, in particular, the way in which customary law is used to protect the well-being of the child and how informal justice systems enforce this protection.

5.3 Care ethics and customary adoption among the Kipsigis

Adoption is generally defined as the process and practice of legally taking and bringing up a child who is not the biological offspring of the adopter.[319] In Kenya adoption is regulated by an Adoption Committee established by the Cabinet Secretary responsible for children matters in line with the Children's Act, 2001.[320] Once an adoptive parent fulfills the legal requirement, the child completely disconnects from his biological parents and assumes the identity of the adoptive parents. The rights and obligations that accrue to the child and the new parents are those that are prescribed in the children's Act, 2001.[321] Such formal adoptions are mostly guided by the needs of the adoptive parents to have a child (or an additional child) rather than by their benevolence, altruism or obligation to care.[322] At the same time, there is usually no kingship relationship between the adoptive parents and the child.

Traditional adoption among the Kipsigis operates on slightly different principles. First, the process takes place within the wider family. The concept of wider family in this study is used to denote what is traditionally called extended family. The word 'extended' is therefore rejected on the basis that it presumes a boundary between the 'main family' and 'the extension'. In Kipsigis family structure, such a boundary is non-existent and members of the wider family are presumed to have the same care entitlements and obligations towards each other. However, this arrangement is much stronger in Emurua Dikkir-Narok County than in Kericho and Bomet where the distinction seems to be progressively setting in.[323]

Since care ethics at the community level operates on the basis of benevolence and altruism, clan and family members are often morally expected to 'adopt' children from their wider family.[324] Traditional adoption within this context takes place outside the state's legal boundary and is purely regulated by customary law. Accordingly, such an adoption only takes place within the wider family. Traditional adoptions under Kipsigis customary law are often triggered by the death of both parents, divorce cases in which the children are left with the father, extreme alcoholism by the father after the death of the children's mother or extreme poverty.[325] Although childlessness is a reason for customary adoption among the Maasai who inhabit the wider Narok county, woman to woman marriages is predominantly the main traditional way of

[319] Zamostny, Kathy, O'Brien Karen, Baden Amanda & Wiley, Mary, 'The Practice of Adoption: History, Trends, and Social Context'(2003) 31 (6) The Counselling Psychologist 651, 652
[320] S 155 of the Children's Act, 2001
[321] Ibid 156
[322] Mathew Bramlett and Laura Radel, 'Factors Associated with Adoption and Adoption Intentions of Non-parental Caregivers' (2017) 20 (1) Adoption Quarterly 5
[323] Participant observation and focus group discussions
[324] Focus group discussions in Bomet
[325] Ibid

addressing childlessness among the Kipsigis in Kericho and Bomet.[326] Adoption is thus not a means of addressing childlessness among the Kipsigis. However, due to cross-pollination of cultures between the Maasai and the Kipsigis, the Kipsigis of Emurua Dikkir-Narok County seem to have incorporated the practice of traditional adoption for childlessness into their culture.[327]

Unlike legal adoption where the parents often express interest in adoption, most cases of customary adoption among the Kipsigis are predetermined by family elders. Thus, once it is noted by the elders that a child or children need adoption, the relevant family members are approached.[328] This decision is informed by the economic status of the potential adopter, their age and consanguinity.[329] Ordinarily the first in line is usually the paternal grandparents of the children, then the adult and married siblings, paternal aunts and uncles, maternal grandparents and finally maternal uncles and aunts. In the absence or incapability of all the above, other members of the wider family may be considered. This care relationship is anchored on blood link so that the closer the blood link, the more the chance that the person will be conferred the duty.[330] It is presumed that close blood links denote a better caring relationship for the children. Although the selected adopter may turn down the offer, such an action lowers ones' status in the family and is generally rare. Additionally, the conferral of such a responsibility is perceived to be a show of respect and approval for ones' status in the community. Acceptance of such a responsibility is therefore perceived as an elevation of one's moral status in the wider family.

Children under such arrangements do not lose their identity nor do they adopt the identity of the adopters.[331] Instead, they retain their parents' identity and have the right to return to and inherit their parents land and property upon attaining adulthood. Even if the adopting relative is childless, the traditionally adopted children cannot take up his/her identity under Kipsigis customary law.[332] It is partly for this reason that traditional adoption is not considered as a remedy for childlessness among the Kipsigis as stated earlier. This Kipsigis practice is different from that of the neighbouring Maasai and Luo communities where the child would have the identity of the adopter (in case of childlessness).[333] Such a child would be allowed to visit and periodically stay with the biological parents (if they are still alive) but would lose the right to inherit from the biological parent and will only be limited to inheritance from the adoptive parent. It is also noteworthy that among the Luo and Maasai, the traditional adopter to the extent that he/she is childless must express interest in the adoption.[334]

The need to maintain lineage within the paternal family explains why traditional adoptions on the maternal side are less popular. However, this was not clear cut as some elders observed that aunts have a more direct biological connection to their sister/brothers children than the wife of the uncle who would ordinarily undertake the day to day caring duties of the children.[335]

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[326] Multiple interviews in Bomet and Emurua Dikkir
[327] Discussion with *Ololmasani* council of elders in Olchobosei
[328] Discussion with Kokwet elders in Emurua Dikkir
[329] Ibid
[330] Ibid
[331] Interview with elders in Bomet
[332] Ibid
[333] Focus group discussion and comparative interviews in Kericho
[334] Ibid
[335] The extent to which cultural beliefs are contested even within the same homogenous cultural group has been extensively explored by Martineau. For details see, Wendy Martineau, 'Achieving Cross-cultural Understanding' (Cardiff University PhD thesis, 2006) 61

Accordingly, some families preferred taking children to their aunts than to the uncles. Asked about this reality, one elder in Bomet contested, noting that; 'our children cannot leave the clan to go and stay with their aunts because that will remove them from the clan. By the time they get older and come back, nobody will know them here and their inheritance may have been taken away so we want them to stay here with their grandmothers or uncles.'

Care as a foundation for relationships thus informed the placement of such children with relatives. In such instances, upon the death of both parents, a girl may be asked to stay with her aunt in a mutually beneficial relationship especially in towns.[336] On one hand, the girl would be expected to take care of the aunt's children by accompanying them to school, helping them do homework and performing some household duties. In return, the girl would herself be entitled to care from the aunt in terms of provision of basic functionings such as education and health. This reciprocal relationship although popular with chiefs, elders and other family members is rejected by Children Officers who see it as child labour.[337] They observe that such children are essentially turned into house helps by their relatives and argue that they fall under children in need of care and protection as envisioned in the Children's Act, 2001.

Although the traditional adoption processes among the Kipsigis were generally approved, their temporariness sometimes exposed the child to abuse by the adopter, a reality that sometimes attracted the intervention of family members.[338] This is because the adopter did not necessarily perceive the child as belonging to him/her as is the case in legal adoptions. Due to the private and domestic nature of these abuses, formal child protection agencies are unlikely to intervene as these actions are mostly concealed either by the neighbours or immediate family members. However, sometimes, members of the wider families do intervene especially if the abuse is gross, such as in cases where s/he is not taken to school or denied basic needs such as clothing. The intervention is not premised on child rights violations but on abrogation of customary caring duties. As such the questions would be 'how can you treat your sister's children like that'' or how can you treat your own grandchildren like that?' and not why you violated their rights.[339] Within this context, care interacts with the language of *utu* (humanness) to confer a certain level of well-being to the children by establishing a standard of treatment based on blood link. Such aunts or grandmothers are therefore admonished not because of violating the children's rights but for neglecting their caring duties and for failing the test of *utu.*[340] The expectation of the clan and the community is that the orphan must be treated in the same way as the children of the customary adopter so that the only justified reason for denial of basic needs is scarcity of resources, but again this is only considered as acceptable if it applies to all the children.[341]

[336] Conversation with elders in Emurua Dikkir
[337] Follow up interviews with children officers in Sotik and Kericho
[338] Discussion with VCOs in Bomet
[339] Multiple conversations in Kericho, Bomet and Emurua Dikkir
[340] Ibid
[341] Conversation with the Chief-Kapsosian

5.4 Cross-cultural conflict between care and rights among the Kipsigis

The overlap and conflict between the language of care and virtues that is inherent in informal justice systems and community conception of childhood often run into conflict with the state conception of child well-being that is based upon justice and rights. This is because state institutions such as Children Officers and courts often emphasise the rights of the child under the Children's Act 2001, a reality which is perceived to be contradictory with customary conceptions of child well-being in which the child is 'right-less'. The conflict between justice and rights on one hand and customary virtues such as care on the other has led to frictions between state institutions and customary institutions.[342] According to the Kericho Children Officer, chiefs and elders are unsuitable for children's cases because their point of view does not resonate with 'the law'. He insists:

> The challenge with these chiefs is that they know very little about children rights so sometimes even when we work with them, we have to teach them. For instance, they know nothing about child labour and child trafficking...Some village elders are old and traditional so whenever I hear of a child's case coming up before them, I usually send someone there to talk to them about children's rights and the law. This way I ensure that their decision respects the child's rights.

Notwithstanding the above position, there is evidence that the care approach embraced by chiefs and elders in handling children's matters resonates well with the reality of children cases among the Kipsigis.[343] Accordingly, players in the rights regime such as children officers, police and courts work closely with those in the care regime such as Kokwet elders in this regard. The following case from Embomos, Bomet highlights this reality.

> Jacob and Kennedy, primary school pupils, were on several occasions, accused of vandalising parts of roadside wooden stalls erected by small women traders and selling the vandalised bits as firewood. They were consequently arrested by members of the public and taken to the police station. They were to be charged with theft but their parents through the children's office intervened to have the case taken over by the chief. At the chief's office, it was decided that the two boys would have to live with their aunties for sometimes as the community was increasingly becoming hostile against them. It was also decided that each boy would be taken to a different school, far away from each other. The idea was that having them together would still result in them negatively influencing each other. Their parents were also asked to pay for the repair of the vandalised stalls.

Thus compared to the child rehabilitation institutions in which Kennedy and Jacob would undoubtedly end up in if found guilty by the formal justice systems, it was observed that caring relationships with the wider family served more to guarantee the children's well-being than courts of law which enforce rights and obligations. Although it was felt by the *Kokwet* elders, chiefs and the community that informal justice systems provided a better platform for resolving children matters compared to courts, the study noted that the extreme focus on maintaining caring relationships sometimes compromises the dignity of the child whose care is under consideration. In other words, the focus on care ethics at the community level may actually

[342] Multiple interviews, Kericho
[343] Multiple observations

violate the (human) rights of the child, at least according to the libertarian conception of the same. One chief in Olchobosei-Emurua Dikkir opines:

> In fact for children, they have to apologize to the parents or adult victim regardless of the outcome of the case. For women, they may be asked to go and apologise at home but children have to apologise immediately before the elders. Even if it is realised that the father, mother or adult complainant is on the wrong, he/she cannot be reprimanded in front of the child. So we will call him/her aside and inform her/him of the elders' decision concerning the issue raised by the child. Sometimes the elders agree with the child's position but they would never want him to believe that he is wiser than the parent or adult complainer. Sometimes we privately urge the parent to grant the child's wishes but in public blame everything on the child and tell him that his lack of interpersonal skills, rudeness or failure to help her parents is responsible for their (in) actions. Somehow we must blame the action/inaction of the parent on the child to make him apologise. That way even if his wish is granted, he will still have respect for the parent. However sometimes if the child is wrong, we will threaten to curse him, ask him to apologise and warn him against a similar thing in the future.

Because of their unequal position in Kipsigis society, women and girls often find themselves bound by both the ethics of care operating at the community level and the (ethics of) rights operating at the legal level.[344] This double obligation results in further insubordination especially in instances where ethics of care at the community level expects them to take away children upon divorce but return them upon maturity (when they need less care) while the ethics of rights entitles children of tender age to care of the same woman without considering the undue burden that accrues from having to comply with the two standards.[345] The fact that the Kipsigis father is less bound by the ethics of domestic reproductive care but only by ethics of productive care often means that he has less obligation towards physical attention for the child.[346] In cases where the wife leaves behind the children upon divorce or separation, they are often transferred from the care of the husband to the care of another woman, either the co-wife, grandmother or aunties. However, it must be admitted that rights as formally understood do not apply to this second category of care as relatives cannot be legally compelled to care under state law. Such an obligation is only enforceable under the customary virtue of care.

Ann Stewart has observed that the woman's primary caring responsibility is interpreted as caring for the child while the man's caring roles are public and linked to his public life.[347] She notes that a good mother is often assumed to care for her child by staying at home to look after her/him while a good father cares for his child by leaving her/him with someone else and undertaking paid employment.[348] The ethics of customary virtue of care thus plays a significant role in restricting women's action to the unpaid domestic sphere while allowing men to venture

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[344] Multiple observations

[345] According to the Children's Act, 2001, Children of tender age are those children under the age of 10 years. It is now settled case law in Kenya that such children are to stay with their mothers. For illustrations see M A A v A B S [2018] eKLR accessible from http://kenyalaw.org/caselaw/cases/view/148515/

[346] For such a discussion see Joy Kroeger-Mappes, 'The Ethic of Care vis-à-vis the Ethic of Rights: A Problem for Contemporary Moral Theory' (1994) 9 (3) Hypatia 108, 110

[347] Ann Stewart, 'The Contribution of Feminist Legal Scholarship to the 'Rights Approach to Development' in Ann Stewart (ed) *Gender Law and Social Justice* (Blackstone Press 2000) 7

[348] Ibid

into the more lucrative public sphere. In other instances women have to juggle care at the domestic sphere with the public sphere especially when they become widows or in cases of extreme poverty as witnessed in Emurua Dikkir and parts of Bomet County where women have among other things, to burn and sell charcoal, a traditionally male enterprise, during the frequent periods of long drought to be able to feed their families.[349]

5.5 Summary

This chapter has addressed the question of how communities guarantee child well -being and the best interest of the child using the language of care and virtues. It has highlighted how care ethics at the customary level anchors the decisions of informal justice systems concerning children and how the ethics of care helps meet the basic needs of orphans and vulnerable children through customary adoption. However, in responding to this question, the chapter has brought out the various contestations in the conception of care and the tensions created by the conflict between care, virtues and rights in view of the interventions by government agencies which focus on the language of rights. As noted in this chapter, a dispute between a child and a parent is resolved by having the parent's authority over the child and the child's entitlement to care by the parent re-affirmed. It can be affirmed, from the above analysis that customary law creates customary obligations and rights which although inconsistent with the language of rights that are implicit in state law, goes a long way in anchoring child protection among grassroots communities. At the same time, the question of enforceability of care ethics, which has been cited as a critic of care as highlighted in chapter three, is addressed by the fact that informal justice systems and by extensions children and communities at large see care as an entitlement that emerges from their community membership and an obligation to care as a responsibility that is anchored on the same foundation. The option for many children is, therefore, to locate their care needs within the community and work to strengthen their integration within the community as discussed in chapter five. It is within such an arrangement that customary adoption comes in to provide care to vulnerable children and orphans among the Kipsigis. Having discussed the location of child well-being within the context of care and virtues among the Kipsigis, the following chapter will explore how Kipsigis customary law understands, creates, sustains and or reinforces the child's best interest as well as how informal justice systems protect and or violate the same.

[349] Multiple participant observations.

CHAPTER 6

Informal justice systems and the protection of the best interest of the child

6.1 Introduction

One of the objectives of this study was to explore the different ways through which informal justice systems respond to and perpetuate child rights violations. Accordingly, this chapter proceeds from the findings of the previous one and explores how informal justice systems protect the best interest of the child among the Kipsigis and the implication of customary law on this protection. Chapter three extensively discussed the concept of 'the best interest of the child' and its foundation in international and domestic human rights law as well as the possibility of protecting child rights and best interest using the language of rights. Chapter four discussed the pursuit of child justice and interest across the various dispute resolution platforms, the procedures in these platforms and the challenges experienced in each system with regards to the question of justice for the child. The previous chapter explored the different ways through which the languages of care and virtues that are firmly embedded in customary law guarantee the well-being of children.

This chapter uses field data to explore the conception and nature of childhood among the Kipsigis in a bid to understand how and why conceptions of customary best interest are created by customary law and how informal justice systems enforce (and or undermine) it. It explores the pillars of the best interest principle under customary law such as; the promotion of a harmonious co-existence between the child and the clan/family; guaranteeing the long term interest of the child; adhering to the customary duties and obligations of parents. Using the issues of child participation in dispute resolution sessions *(Kipkaa),*conception of best interest in marital disputes, production and consumption of traditional liquor by children and corporal punishment among the Kipsigis, the chapter explores the contextual understanding of a child's best interest and the dynamics in the conceptions of best interest of the child under Kipsigis customary law. Accordingly, the chapter attempts to highlight the (in) consistency between statutory and customary conceptions best interest and the role that informal justice systems play in protecting and anchoring the same.

6.2 The child under Kipsigis customary law

Both national and international law consider a child to be an individual who is below 18 years.[350] However, under Kipsigis customary law, the understanding of a child varies from an unmarried man or woman to a person whose parents are still alive. Childhood is also considered as a state of mental incompetence or underdevelopment. Accordingly, parties, regardless of their age, who were contesting trivial matters before the *Kokwet* would largely be considered as children. Thus, cases of two brothers fighting over land boundaries were considered as children's matter regardless of their age.

[350] See for instance art 260 of the Kenyan Constitution and s 2 of the Children's Act, 2001 cf art 1 of UNCRC

Since childhood was attached to mental incapacity, age as a qualifier of childhood only played a minimal role in understanding childhood. Childhood among the Kipsigis is therefore gained, lost or regained depending on the circumstance. This reality explains the existence of child marriage. Generally, girls who had babies lost their childhood as did boys who dropped out of school to go into economic enterprises such as tea farming or motorcycling. At the same time, the concept of a child was widely cited whenever elders were speaking to younger adults especially when they disagreed. Phrases such as 'you are still a child that is why you do not understand this' were very common during the *Kokwet*' sessions. The 'child' in such context implied a lack of knowledge on tradition and customs rather than an age reference.

As discussed in chapter three, there are several intersectional factors that influence the construction of a child's identity, key among them being the gender, age and regional location of the child.[351] Accordingly, in the more conservative parts of Kipsigis land such as Emurua Dikkir, the conception of childhood was found to be highly gendered. For instance, in situations where a parent had several children, the responsibility to take care of the other siblings always fell on the male child even when he was of a younger age. His responsibility was to ensure that 'order' was maintained in the home. Upon the return of the parent, the male child would be obligated to report to the parent about the activities (including omissions and commissions) that took place in the parent's absence. Female children could be conferred such responsibilities, but their roles were limited to household duties. Productive roles like ensuring that milking was done (the milking itself was done by girls), taking care of the cattle and securing the home were given to the boys in the absence of their parents.

The contextual understanding of childhood among the Kipsigis is partly responsible for the high prevalence of FGM. This is because a woman who has not undergone FGM is considered as a child regardless of her age.[352] Accordingly, women often opt for FGM as a way of escaping from 'the yoke of childhood' and demeaning reference and discrimination by the other women who have undergone FGM.[353] Similarly, a man who marries a woman who has not undergone FGM is considered to have married a child under customary law.[354] Such a marriage would be considered as socially unacceptable and the man would often face ridicule from his peers.

It was also noted that the disapproval of uncircumcised women was more prevalent for Kipsigis women who had not undergone FGM than it was for non-Kipsigis women who had not undergone the practice. Accordingly, women from neighbouring communities who were uncircumcised were generally considered as adults regardless of whether they had undergone FGM or not.[355] Although the situation is changing, at least according to the chiefs interviewed in the research, the consideration of uncircumcised women as children, and the stigma associated with it, is still quite prevalent, especially in the semi-arid Emurua Dikkir sub-county.

The conception of childhood outside the context of age is considered by Children Officers to pose a challenge to the state-based child protection initiatives. This is because many cases of early marriage go unreported because the girls or boys are considered as adults upon

[351] Nadan (n 218)
[352] Interview with elders in Emurua Dikkir
[353] Ibid
[354] Ibid
[355] Interview with a social welfare officer in Kilgoris-Narok county

circumcision. The boys are considered to be mature immediately after circumcision or upon exiting the education system, while the girls are presumed to have attained adulthood either after undergoing FGM or after having a child.[356] The legal possibility of having two children at the same time especially for teenage mothers is therefore irreconcilable with local realities where having a child would mean that the mother has exited childhood. State attempts to prosecute child defilers, especially where the same results in pregnancy, often runs into conflict with customary understandings of childhood thus making such initiatives ineffective.

Childhood is therefore understood within the context of responsibility rather than a stage in the development of the person. The extent to which this understanding contributes to (and undermines) the best interest of the child is explored in the next section.

6.3 So what is 'in the best interest of the child?'

As noted in chapter three, the concept of best interest is highly contested among scholars and child protection agencies. Approaches range from a consideration of virtues as the best foundation of best interest to the location of best interest within the language of rights and state law. Still, other practitioners see the best interest of the child as a contextual concept that is best achieved by taking into consideration the socio-economic and cultural realities of the child.[357] Such an approach has however received only lukewarm reception from international child protection agencies as well as domestic statutory child protection actors who see it as diluting the universality of childhood, especially the underlying presumption of the UNCRC that all children deserve the same set of rights in the same way.[358]

There are different approaches to guaranteeing the best interest of the child at the community level. Formal child protection agencies such as children officers and courts generally consider elders and chief's intervention in children matters to be unsuitable and only turn to them as a point of last resort.[359] This is because they consider customary law upon which elders and chiefs largely rely, to be inconsistent with the well-being of children. Similarly, the Committee of Experts on the Rights and Welfare of the Child, that monitors ACRWC, considers informal justice systems to be unsuitable for children, noting and classifying children under such systems (together with disabled children)[360] as being vulnerable and therefore in need of protection. Specifically, the Committee observes that:

> Where informal justice systems (traditional, customary, chieftain based) co-exist with formal court systems, states parties must consider how charter rights, including children's rights to participate in proceedings which concern them, are to be protected, and awareness of child rights standards amongst role-players in informal justice systems must be furthered.[361]

[356] It is noteworthy that due to pervert many children do not proceed with their education beyond the primary school level.
[357] Abdullahi An-Na'im, 'Cultural Transformation and Normative Consensus on the Best Interests of the Child (1994) 62 8 International Journal of Law and Family 62, 63
[358] Bentley (n 221)
[359] Interview with Magistrate at Bomet Children's Court.
[360] See Committee of Experts on the Rights and Welfare of the Child (194) 23
[361] Ibid 26

The conception of customary law and customary structures as being dangerous to children is not new. During the colonial period, the colonial governments in Kenya established boarding schools that were basically Christian-based institutions.[362] The idea was to 'remove' the children from the customs and orient them into the western way of life and thinking.[363] Accordingly, boarding schools became civilizing tools for children and a means of 'saving' them from what was considered as 'archaic' customary processes. The colonial conception of customs as being inconsistent with the best interest of the child is still predominant to date and is reflected by official government policy on the subject. For instance, the National Children Policy notes that 'cultural and traditional practices constitute one of the major challenges to the full realization of child rights in Kenya' and suggest the different ways through which society could 'fight retrogressive and repugnant culture.'[364] The same is highlighted in the Children's Action Plan which lists cultural beliefs to be among the obstacles to child rights protection.[365]

6.4 The underlying pillars of the best interest of the child among the Kipsigis

Fieldwork findings reveal that the best interest of the child under customary law is anchored upon five pillars namely: Promoting a peaceful co-existence between the child and the clan/family members; guaranteeing the long-term interest of the child; realizing the immediate socio-economic needs of the child; the protection of the child's clan and ancestral identity, contextual analysis of best interest and adherence of the parents to customary obligations as a means of preventing intergenerational curses on the children. The following section discusses each of these customary principles.

6.4.1 Promoting a harmonious co-existence between the child and the clan/family members

While international law and scholars like Freeman and Cordero see the paternalistic role of parents as being inconsistent with the child's autonomy, Kipsigis customary law sees parents as central to the best interest of their children.[366] In other words, the best interest of the child is only that which the parent or guardian consider to be in the interest of the child. My fieldwork also observed that the best interest of the child is not necessarily the primary consideration in all matters concerning the child. Rather the best interest of the child, under Kipsigis customary law, is balanced against the best interest of the other children in the family, the best interest of the parents and that of the community at large. The elevation of the child's best interests above all other considerations both within and without the family is therefore foreign to Kipsigis understanding of both the individual and the child.[367]

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[362] Daniel Sifuna , 'Increasing Access and Participation of Pastoralist Communities in Primary Education in Kenya' (2005) 51 In International Review of Education 499, 504

[363] Ibid

[364] Government of Kenya, *National Child Policy* accessed from http://www.childrenscouncil.go.ke/images/documents/Policy_Documents/National-Children-Policy.pdf p 11

[365] Government of Kenya, *Children's Action Plan,* accessed from http://www.childrenscouncil.go.ke/images/documents/Policy_Documents/National-Plan-of-Action-for-Children-in-Kenya-2015.pdf 24

[366] For a discussion on these views see Matias Cordero Arce, 'Towards an Emancipatory Discourse of Children's Rights' (2012) 20 (3) The International Journal of Children's Rights 365

[367] Participant observation and follow up conversation with elders in Kaptengecha-Bomet

The best interest of the child, among the Kipsigis is often protected by strengthening the child's links to family and the local community.[368] Accordingly, the focus is not on elevating the autonomy of the child (as emphasised in state and international law) but on aligning or subordinating the individual child's preferences to the interests of the nuclear family or even the wider family.[369] Because of the collective concept of parenthood among the Kipsigis, constructing a mono-axis responsibility for the child is problematic especially in polygamous unions. Accordingly, there are instances where responsibility to care for the Kipsigis child is conferred on to the second or third wife within a polygamous marriage especially in the cases where the children's biological mother is sick, disabled or deceased.[370] Thus maintaining a positive relationship with the clan not only strengthens this insurance but also guarantees the child well-being, both directly and indirectly. Part of this is fulfilled by adhering to a child's duties of respect which is sometimes enforced by the IJS.

In many parts of Kipsigis land, social protection services by the government are either inaccessible or inadequate.[371] Children, therefore, access social protection largely from family and community members through a reciprocal care relationship as discussed earlier. It is therefore in the child's best interest to maintain a positive link between him and the guarantors of his/her socio-economic well-being. Thus, the absentee state is not only responsible for the prevalence of community-based approach to the interest of the child but also a product of the same because state agencies responsible for social protection often rest easy knowing that families and communities are carrying out the caring roles towards the children. Notwithstanding this reality, the difference between community and state-based conception of best interest generally make most state interventions unpalatable to most members of the community even if the state robustly intervenes. This is partly because although Children, under the Children's Act, have responsibilities towards their community and family, the same is rarely enforced. However, Kipsigis customary law strongly enforces the child's responsibility principle to the extent that a child's best interest-such as food and education (school fees) could potentially be withdrawn if she/he fails to perform her responsibility.[372] The Kipsigis consider the best interest in a much more contextual way and would often undertake actions (or inactions) that violate state law if the same is seen to be in the customary best interest of the child. This explains why despite state and NGO efforts at eradicating child marriage and child labour, the practices are still prevalent among the Kipsigis.[373] On one hand what the state calls child labour is sometimes considered as child socialization by the community, especially if the same is done at the family level while child marriage of teenage mothers is generally seen as justified and even desirable.[374] Janet's case illustrates this reality.

> Janet was a 15-year-old secondary school girl who had a baby. Her parents decided that 'they could not pay school fees for another parent' resulting in her dropping out of school. Throughout her pregnancy and childbirth, Janet experienced a lot of

[368] For a similar observation see Alston (n 174) 5
[369]Cf ibid
[370] Conversation with elders in Kericho
[371] Participant observation .For instance travelling from Emurua Dikkir to the Children officer in Kilgoris takes 4-5 hours on a motorcycle at a cost of Ksh 300 (3 Euros). Any problem that cannot be addressed by the children officer has to be reported to the Children's coordinator in Narok town which is 8 hours away (Ksh 700-7 Euros using a motor cycle)
[372] Participant observation during *Kipkaa* sessions
[373] Conversation with Children's coordinator, Bomet
[374] Focus group discussion in Abossi, Emurua Dikkir

> hostility from her parents and family. Part of the problem emanated from the fact that her child, who due to tender age needed a lot of medical care and attention, was seen as an excessive burden on the family and was therefore resented. The frequent conflict between Janet, her parents and siblings often attracted the intervention of her grandfather and other family elders. On several occasions, they tried to enforce a customary law obligation of a grandparent to care for the grandchild as a means of having Janet's parents care for Janet's child. However, this did not yield much. She eventually moved into her grandmother's house, but life was not any easier because the family was generally poor. Her grandparents eventually organized for her and her boyfriend to get married as a means of alleviating her and her child's suffering.

Thus, although child marriage is universally considered as inconsistent with the best interest of the child, there are circumstances where the same is justified on the same best interest principle. This reality mirrors Bentley's observation that:

> The difficulty with setting a universal benchmark in this regard is that the custom of marriage itself is not a universally understood one, and so the significance of getting married is not limited to the Western understanding of one man and one woman consenting to be partnered in various ways. In many instances, marriage is, at least partly, a financial transaction, and so the age of the parties may in this sense be irrelevant. In other cultures, marriage is seen as a union of families rather than just two individuals, and again age may not be a crucial factor in determining the appropriateness of this union.[375]

Janet's case perhaps raises questions on the essentialist nature of the universal conception of a child's best interest at least from the perspective of Kipsigis girls. Thus Janet's best interest may be different from the best interest of her child. Whereas it is legally enforceable to compel Janet's parents to care for her on the basis that she is still a child, the same cannot be said of Janet's child because, under the Children's Act, 2001 grandmothers do not have any obligations to their grandchildren. Their obligation is only limited to their children. However, as can be inferred from the above case, Janet's best interest is intertwined with that of her child so that the same can only be achieved by balancing her interest with that of her child. Thus, although the family would naturally be a suitable institution for Janet, the same seem to be inconsistent with the interest and well-being of her child. This is because the hostility from Janet's brothers, sisters and parents towards her and her child is not in the child's best interest and because this hostility is anchored on interactional grounds, no intervention by either formal or informal justice systems could potentially save Janet and her child. Since as noted in chapter three, social good and best interest, in particular, are derived from a reciprocal interaction in the family, such a hostility essentially makes it impossible for Janet to derive well-being from her family for herself and for her child. Since the life and interest of Janet's child cannot be separated from hers, a more nuanced approach may be in her best interest. Similarly, the obligation to care for children under state law ordinarily falls on the biological parents, even in polygamous unions, so that in cases where one woman is unable to care for her children, the shift in responsibility to the other wives can only be justified through customary law. Institutions that enforce state

[375] Bentley (n 221) 116

law, such as children officers and courts are generally inadequate in this respect.[376] Accordingly, they often have to refer such cases to *Kokwet* elders or chiefs.

Faced with cases similar to Janet's, IJS often find it impossible to reconcile the difference between the interest of the baby and that of the girl (the mother) since children born out of wedlock do not have the right to inherit from their grandparents under Kipsigis customary law. Accordingly, marrying off girls who have children outside wedlock is considered as one way of attempting to guarantee the interest of the baby. The challenge is that within this context, the best interest of the girl is usually compromised as she is often compelled to drop out of school and get married when she is still not mature enough for the same.

It must, however, be pointed out that under customary law, Janet's mother had an undisputable customary obligation to the child. However, her refusal to perform this duty transferred the duty to Janet's grandmother, a situation that created a reciprocal relationship between Janet and her grandmother. In other words, Janet and her child were expected to help their grandmother and great grandmother respectively perform household duties in return for livelihood. However, the high level of poverty at the grandmother's place strained this arrangement resulting in the final decision to marry her off. Additionally, the naming of children after their grandparents often establishes a direct link between the grandparents and the grandchild, a relationship which establishes caring obligations as was expected in Janet's case. In a similar scenario, Agnes a 14-year-old girl had been thrown out of her parents' home when she became pregnant and approached the chief for assistance. The chief summoned her parents for dispute resolution, but the parents refused to heed these calls and observed that Agnes should go and live with her boyfriend since the pregnancy was a source of embarrassment to the family. Noting that the parents would not budge, the chief summoned Agnes's grandparents who accepted to stay with her. The chief also promised to help Agnes secure a bursary from the National Government Constituency Development Fund since her parents refused to continue paying for her education. The challenge with the customary conception of best interest of pregnant teenage girls is that it legitimizes and normalizes defilement and child marriage thus compromising the interest of other girls. Asked why they allow the early marriage of girls, one elder notes:

> You know there are lots of early marriages here. Usually, when teenage girls come here and tell me that they have been made pregnant by so and so, I usually tell them to go home and give birth first. Once they have given birth, I will now have evidence. Once the child is born, I will call the man and emphasise to him that what he did is against the law. I will then ask him to provide child maintenance for the child. Sometimes we even punish him by asking him to pay school fees for the girl.[377]

Although abortion services would be considered as an option for teenage girls in such scenarios, the same is considered as an abomination under customary and religious law and expressly as illegal under state law. Being members of the customary and religious systems, the girls and their parents are often unlikely to pursue this option. Furthermore, the fact that the parents of such girls seek for help from the chief and elders, rather than from health facilities often means that the kind of support available to them is that which is consistent with local customs and

[376] Conversation with Children Officer, Kericho
[377] Volunteer children officer -Sotik

moralities. Accordingly, reproductive services, including abortion services are generally not an option for such girls. First because of reasons cited above, secondly because public hospitals which are the main health facilities in Kipsigis land would be unwilling to undertake abortion due to legal reasons and lastly because, after a number of months, a foetus would be considered as a person under customary law and would require burial ceremonies in the event of an abortion or the girl would stand cursed.[378] Thus even if abortion was to be permitted under state law, the same would have to be done very early in the pregnancy, before the community members are able to notice it, otherwise the girl's best interest would be compromised by the elaborate ceremonies that a woman who has had stillbirth would be required to undergo. Thirdly sexuality as a topic is generally not discussed with children under Kipsigis customary law due to the presumption that they are mentally incompetent and pure and that doing the same would not be in their best interest. This, however, is contradictory. Although there is no specific social sanction on this, the fact that Kipsigis social system allows for child marriage and FGM on one hand while rejecting discussions on sexuality and therefore contraceptives for children on the other raises the earlier discussed concern of how powerful forces within given communities create, shape and reshape acceptable standards of behaviour and how classical customary law interacts with globalization, Christianity and state law to reproduce patterns of oppression.

6.4.2 Guaranteeing the long-term interest of the child

The fieldwork in this study noted that IJS among the Kipsigis are largely concerned with guaranteeing the long-term interest of the child. Even when short term interests are protected, such as in cases of provision of socio-economic needs, it is only done as a means of achieving the long-term interest. However as noted earlier, these interests are shaped by the intersecting factors such as poverty and gender of the child. Joy's case highlights this reality.

> Joy, a secondary school student, was sent home to obtain school fees. Her mother was poor and would only survive by working in their neighbour's tea plantation. On the fateful day, her mother asked her to join in the work after her return from school. In return, the money that they earned would be used to pay her school fees. However, Joy refused, noting that it would be embarrassing if her schoolmates saw her picking tea in a neighbour's farm during school time. She instead suggested that she be allowed to work in their small maize farm, an offer that her mother flatly refused. Her mother thereafter refused to pay her school fees. A week later, Joy decided to go to school, although without the money and was sent home again. She reported to her grandparents who referred her to the chief. Through his intervention, Joy was able to obtain financial assistance from the National Government Constituency Development Fund. However, her continued refusal to help her mother in working on the neighbour's farm remained a major source of conflict between them. She moved into her grandmother's house but had to return to her parent's and help her mother with the work upon the death of her grandmother.

This focus on long term interest[379] of the child at the expense of immediate interests often translates into the complete extinguishing of the immediate interests especially those related to

[378] Discussion with a Kapsosian Assistant Chief
[379] Long term interests are those benefits that accrue to the child after a given period of time.

the civil identity of the child. As noted above, Joy had to forgo her 'freedom from child labour' and 'freedom of choice' in return for shelter from her parents and education. Accordingly, and in line with trends across many rural communities in Kenya, children are seen as mentally underdeveloped and therefore unable to make decisions concerning their well-being, both in the present and future. Rights to participation, freedom from child labour, speech and even movement are therefore curtailed (ostensibly for their own interest) except when approved by parents or another elderly member of the clan.

In Kipsigis understanding of childhood, children do not possess agency and therefore cannot make any independent decision. Parents are therefore the full trustees of their children. This conception of children has resulted in the prevalence of corporal punishment which although perceived as painful, is considered to be in the long term interest of the child. In other words, childhood is considered as a right-less socialization and transition stage in which the focus of community members is to mould a child into responsible adulthood. Within this context, the focus of the Kipsigis community is on guaranteeing education, health, clothing and food for survival and inheritance for future well-being. Corporal punishment is therefore considered as a corrective means of achieving the ends of education and promoting the future well-being of the child.

The concern for the long-term best interest of the child, at the expense of immediate considerations explains why inheritance is a right of the (male) child at any age. The central concern is that land, being the main factor of production among the Kipsigis must be availed to all its members. Thus, contrary to state law where inheritance only occurs after the death of the benefactor, Kipsigis customary law allows children to inherit from their parents while the parents are still alive. Accordingly, parents are expected to subdivide their land according to the number of male children in the household. Each male child could then be shown his own piece so that once he matures he can take possession of the land and hold it for the future generation (his children). Maturity is very relative and could be considered in terms of finishing school or getting married rather than purely as a matter of age. However, until he comes of age, the boy has abstract entitlement to the land; he cannot determine what is grown on the land or its otherwise use (as is the case in other forms of property ownership). His only interest lies in future possession which would be activated upon attaining adulthood. Parents under Kipsigis law are therefore presumed to hold ancestral land in trust for their male children, an issue which comes close to elevating the interest of the male child above that of the parents. This is because, under customary law, a parent cannot freely dispose of ancestral land as he would do to other forms of property (including non-ancestral land, such as property in towns). However, my fieldwork revealed that this was not clear cut. According to some elders, the sale of ancestral land by the father could be validated if the sons expressly approved of the same or if the same was occasioned by the financial needs of the son, such as the need for school fees. In such contexts, the sons' participation in the resolution of the land dispute between their two parents is considered to be paramount. The following extract from an interview with a chief in Emurua Dikkir explains this reality:

> In some cases, male children come up and defend the land sale especially if it used to pay their school fees. They will say 'let the land be sold for my school fees. I will work hard in school, find a good job and buy another piece of land'. In that case, he will just sign somewhere and then the sale will continue. That way he will not turn around and say the father sold his inheritance….You know sometimes the

> other children may already be out of school/or may have dropped out because of school fees, so they will say 'if our school fees was not paid because there was no money, why should land be sold for him? So, in this case, we can assume that the piece that has been sold to pay fees belongs to the one whose fees is being paid and if he agrees then there is no problem. That way you will have rescued his education and avoided conflict between the children as well as between the parents.[380]

It is also noteworthy that women were more concerned about the inheritance of their (male) children than men. In fact, in most instances, the cases were brought against fathers who intended to sell part of their land without leaving an adequate portion for the boys to inherit. In some instances, men on marrying a second wife would transfer most of the productive land to the second wife and her children, leaving the first wife and her children with only minimal sizes which could not be enough for their survival. Accordingly, such women moved to the elders to seek their intervention over the disinheritance of their children.

The inheritance question perhaps best illustrates the understanding of the best interest principle among the Kipsigis. As noted above, the best interest is seen in the context of what would be in the best interest of the child in future rather than what is in his best interest now as stipulated by state law. Actions done for or against the child, therefore, focused on his interest upon attaining adulthood rather than his immediate concern. Accordingly, there are instances when the child's immediate interest or wishes were disregarded in favour of actions or inactions that would guarantee future well-being. Thus, for instance, child labour at the family was closely tied to the generation of school fees which was considered as crucial to the child's continued stay in school and therefore a better life in future. His/her voice over whether to provide labour at the family level was therefore irrelevant and any refusal to do the same would attract consequences including withdrawal of all school fees support.[381] The state law assumption on the parent's unequivocal rights-based and unconditional obligation to cater for the education needs of the child is therefore alien to the Kipsigis.

6.4.3 Adhering to the customary duties and obligation by the parents

The research showed the self-reinforcing nature of customary law and its primary units of enforcement; taboos, curses and cleansing essentially mean that parents have to comply with customary requirements in family matters as failing to comply would elicit a generational curse which will be transferred to the children upon his/her death. At the same time, failing to comply with certain customary standards would directly transfer the bad omen to the children and would sometimes require the entire family to be cleansed. For instance, if a man does not pay (or finish paying) bride price for his wife, all his male children cannot pay bride price for their wives. At the same time, he cannot give his sons cattle for bride price payment.[382] Similarly, he will not be able to receive bride price for his daughters upon their marriage. This ban is transmitted across generations and has the long term consequence of delegitimizing the marriages of the children of the man as their marriages will not be recognized customarily unless bride price is paid but the same cannot be paid by them (or for them-in case of girls)

[380] Mogor Chief
[381] Participant observation and focus group discussions in Bomet and Emurua Dikkir.
[382] Conversation with *Ololmasani* Council of Elders

because their father did not do the same. Such an anomaly can only be cured by having the man (or after his death- his relatives), pay the bride price to the wife's family, regardless of whether the wife is dead or alive. Bride price payment is thus not only a means of legitimizing one's marriage but also a way of guaranteeing the future best interest of the children and ensuring that their marriages are complete.

It is thus considered a taboo for a man to receive his daughter's bride price or give his son animals to pay as bride price if he did not pay bride price for his wife (or wives) as doing the same results into a curse.[383] Thus bride price entitles the man and woman to receive bride price from their married daughter. Similarly, a man who dies in the city before building a house in the ancestral land or personal land in the village cannot be buried until and unless such a house is built.[384] This is because the burial location is determined by the house and a house by its very nature is considered to be a reflection of status. Burying a man on ancestral land without first building a house for him is considered as taboo and thus attracts bad omen. The man thus builds a house on his ancestral land partly to cushion his children against the bad omen that would accrue if his children and family would bury him without building him a house and partly as a way of realizing his own status. Joan's case in Bomet highlights this reality.

> Joan was married to James in a civil marriage and had three children. As is the practice among many Kipsigis, the couple started off by fulfilling all the customary marriage obligations, including the payment of bride price. However, after 10 years, they opted to divorce through a court process. Upon their formal divorce, James did a civil marriage with Winnie, a lady from the Luhya community. James and Winne had two children in their marriage. However, James' family members insisted that since his customary marriage to Joan had not been nullified through the Kipsigis customary divorce process, he was still validly married to Joan and that the second marriage to Winnie could only amount to polygamy. To this end, his father was, according to Kipsigis Customs, expected to lead in negotiating bride price for Winne as the second wife since James' marriage to Winne was considered as socially and culturally incomplete without the customary marriage processes (regardless of the existence of the marriage certificate from the state). However, the father refused to welcome Winnie and her two children to his home or lead in bride price negotiations because Kipsigis culture expected Joan 'the first wife' to pick the 'second wife' (Winnie) from her home and introduce her to the family. However, Luhya culture to which Winne belonged considered this as a taboo. According to the Luhya customs, a lady (in this case Winnie) would go alone to her marital home or be escorted by the husband or any of her relatives but certainly not by her 'co-wife'. This is because the Luhya considered all wives to be equal while the Kipsigis considered the second wife to be inferior to the first wife because she was seen as coming in to help the first wife take care of the husband, the land and the family. However, Joan refused to pick Winnie since she blamed her for ruining her marriage to James. Although she recognized the validity of the legal divorce, she wanted her father to return the bride price that was paid by James and facilitated all customary divorce processes so that she and her children can be 'free'. However, James parents and her parents refused such an option, a factor which meant that under Kipsigis customs, she was still married to James and could thus not marry another man. Within this context, her children were entitled to ancestral land on the basis of customary law while Winnie's

[383] Ibid
[384] Ibid

children to the extent that the family and clan neither recognized her marriage to James nor welcomed them, would not. Any marriage between James and Winnie (who subject to bride price payment, would customarily be considered as a second wife) without the blessings of the parents and Joan, was presumed to bring bad omen to Winnie's children. In fact, as at the point of completing the data collection process in this study, a joint family meeting had been organized between Winnie and her parents, Joan and her parents as well as James and his parents to determine the fate of each party and the children.

In conclusion, it can be noted that parents often fulfill customary obligations partly to prevent intergeneration curses and bad omen from befalling their children. Thus in this context, the best interest of the child is seen to directly influence the parent's action. Similarly, in instances where the man is terminally ill, family members often opt to fulfill all the customary obligations as a way of cushioning the children in case he dies.[385]

6.4.4 The contextual understanding of the best interest of the child among the Kipsigis

As highlighted earlier, the Kipsigis believed that what was in the best interest of the child was context-specific. However, regardless of the decision made, the dichotomy between the child and parent, the unequal power relations between parents and children and the identity of children as property of their parents was always maintained by the informal justice systems as it was seen to provide an umbrella through which children's well-being was protected. In other words, Kipsigis customary law considered children to only flourish under the umbrella of parents or another adult, an action which required the waiver of some of their liberties. This customary contextual understanding of best interest is explored through the lenses of; child participation in dispute resolution (*Kipkaa)* sessions, child's best interest in marital disputes, traditional liquor production and consumption and corporal punishment.

6.4.4.1 Best interest of the child and child participation in Kipkaa

The Committee on the Rights and Welfare of the Child has criticised traditional justice systems on the ground that they largely ignore the child's rights to participate in the dispute resolution proceedings, despite the fact that the same is firmly anchored in domestic and international child rights instruments.[386] However, it is noteworthy that the exclusion of children from the proceedings is a practice that is anchored onto the customary practices and is itself presumed to be in the interest of the child by the Kipsigis. According to *Kokwet* elders, a child who is accused of any offence cannot directly appear before the elders to respond to the offence.[387] An adult member of the family such as a parent, uncle, aunt, or older brother usually appears on behalf of the child.[388] However, the representation of the child by an adult is also gendered. Thus unlike older brothers, older sisters are prohibited from representing their younger siblings before the elders as they are considered not to have *locus standi* before the elders due to the notion that they are 'temporary' members of the clan who will get married and join other clans.[389] Although children may be physically present during the proceedings, their

[385] Conversation with Kokwet elders in Bomet
[386] Committee on the Rights of the Child, 'Concluding observations on the combined third to fifth periodic reports of Kenya-2016' accessed from **http://www.refworld.org/publisher,CRC,,KEN,57aaeb8b4,0.html**, par 23
[387] Kokwet elders in Kericho
[388] Interview with elders in Olchobosei-Emurua Dikkir
[389] Ibid

involvement is limited to the clarification of facts and not to respond to the charges.[390] In cases where one child offends another child, the parents of both children usually appear before the *Kokwet* elders together with their children to have the matter resolved.[391] According to the elders, such cases are considered to be much more serious as they often threaten to ignite enmity between the parents or families of the two children. One Emurua Dikkir elder points out:

> Sometimes children fight and cause physical injuries on each other especially when they go grazing. When this happens the families usually intervene and try to resolve but you see each parent will be defending her child. In such cases, we intervene so as to avoid permanent enmity in the clan because you know children can easily forgive each other while parents do not. So you will find that the children who fought today are playing together tomorrow while their parents are still holding grudges…In most cases, we ask the parents of the offending child to pay the medical bills of the injured child.

As such there is very minimal participation of children in the dispute resolution proceedings. Part of the reason is that when a child commits a crime, such as stealing tea which was common among the Kipsigis of Kericho and Bomet, the offender is not only the child.[392] Rather, his whole family is considered to be responsible for the theft, by either failing to perform their positive or negative duties towards the child.[393] Specifically, the parent is presumed to have failed his positive obligation of properly bringing up the child in a disciplined manner and failing to provide the basic needs that the child requires for a fulfilling life. Within this context, the child is considered to be mentally immature and therefore not fully accountable for his actions. Accordingly, the parent or guardian is expected to appear before the elders alongside the child, (or sometimes in lieu of the child) to respond to the charges on behalf of the child.[394]

Similarly, the offended party, to the extent that he himself is a child (such as in the case of two children fighting) would be represented by their parents because an offence against a child is considered as a wrong against his whole family and in some instances, against the whole clan.[395] Minimal child participation in informal justice processes is based upon the fact that compensation, which underlies most IJS proceedings require property and yet children do not generally own property and therefore cannot compensate the victim of their offences.[396] Thus, to the extent that IJS factors in compensation, the best interest of the child is best achieved by limiting their participation and maximizing the participation of the parents.

Thirdly, equal participation of both adults and children in the IJS processes would be considered as violating the customary dichotomy between children and adults in which it is considered undesirable for children to participate in adult activities and vice versa. Thus cases, where the child presented himself before the elders without a parent or guardian, were generally discontinued regardless of the age of the child or nature of the offence. At the same time, parents were seen to be the guarantors of the child's behaviour change so that when a child was

[390] Participant observation in Chemamet-Emurua Dikkir
[391] Ibid
[392] Cf Nobirabo Musafiri (n 8)
[393] Focus group discussions in Kericho and Bomet
[394] Participant observation, Bomet
[395] Ibid
[396] Focus group discussion in Emurua Dikkir

arraigned before the chief or elders and a decision was made over certain actions to be undertaken by the child including punishments, the parent would often sign or stamp his thumbprints on behalf of the child. The assumptions in the eyes of the chiefs and elders is that the parent can essentially make a commitment on behalf of the child. This practice had mixed implications. On one hand, it protected the identity of the child by ensuring that his or her name did not directly feature in the chief's record. On the other, it converted the child into a property of the parents and put pressure on them to ensure that the child complied. Since compliance was often enforced through corporal punishment, the practice essentially exposed children to a lot of corporal punishment by the parent. For instance:

> Jemimah's child had been accused of conspiring with other boys to steal and sell tea leaves from her neighbour and Jemimah had stumped her thumb at the chief's office that the same would not happen again. Asked how she was going to enforce that she observed that 'she will not accept any further embarrassing from the child and that if necessary she will have to cane him until he stops embarrassing her. Such an embarrassment as Jemimah calls it, is worsened by the fact that as a guarantor of the child's behaviour change, she would have to appear at the chief's office with the child and explain the circumstances and reasons for the violation of the directive.

Notwithstanding the above, the study found out that children who were presumed to have exited childhood, such as those who had exited school into child labour or child marriage could sign the record book by themselves although their parents were still encouraged to be present during the *kipkaa* sessions.[397] Accordingly, the school was seen to offer two sets of protection. On one hand, a child in school was seen as a 'true child' and was thus protected from negative influence by other children who had dropped out of school. On the other hand, such a child, in the event that he committed an offence could have the parent sign on his behalf, essentially protecting his identity especially because the chief's record book was a public document that could be shared with different government agencies based on the need and circumstances.[398] Despite the fact that children do not have identity card numbers which had to be indicated against one's signature or thumbprint on the chief's record book, 'mature minors' could be allowed to sign it even without an identity card number because they were perceived to be outside the control of parents, a factor which would negate any attempt by the parent to guarantee their behaviour change. In essence, such children were presumed to have joined the public space and therefore fully responsible for their actions (or inactions).[399]

In line with the principle of child-adult dichotomy, it is presumed as customarily undesirable for elders to assemble to listen to the children's case as they are considered as being too trivial. As opposed to the other cases where the chief would often call upon elders, children's cases were often heard solely by the chief and a small number of elders unless it was reported in the middle of an adult's case in which several elders were already gathered.[400] For clarity' children's cases' in the eyes of the Kipsigis informal justice systems were cases in which a child had been accused of an offence. Cases such as child maintenance, offences against

[397] Interview with elders in Mogogosiek
[398] Participant observation and interview with chiefs in Bomet
[399] Ibid
[400] Participant observation in Bomet

children, custody and disinheritance that are considered as children's cases under formal law were considered as adult's cases.[401] Such cases were either heard in the morning before other cases or at the end of the sessions. Since they generally had fewer witnesses, cases concerning adults could sometimes be interrupted to allow the elders and chief to address the child's case which was considerably less time-consuming. Participation, the cornerstone of (or) basis for international and domestic child rights law is therefore highly disapproved of in informal justice processes. This is because the operational and normative structure of the IJS is generally seen as inconsistent with child participation.

Fourthly, excluding the parent from the proceedings of the child would be unjust to the parent as it would be unfair to have him/her give compensation in proceedings to which he was not part of.[402] Participation thus enables the adult to negotiate the amount and schedule of compensation in line with customary standards and his/her economic status. Key factors considered in negotiating the amount and schedule of compensation include firstly, the relationship between the offended party and the child - the closer the clan or family relationship, the lesser the compensation. In fact, in some levels of familial proximity such as offences against uncles or aunts, compensation is usually disregarded. Secondly, compensation is partly dependent on the age of the child. Offences committed by older children attracted less corporal punishment and more material compensation compared to those committed by younger children.[403] Lastly, the nature of the offence committed by the child and the socio-economic status of the parent and the wider family also determined the quantity of compensation. It was also observed that extraneous factors such as performance in school or attendance at a prestigious secondary school (which was linked to performance and future potential) could be mitigating factors against corporal punishment.

As opposed to formal justice systems which mainly address the dispute presented before the court, IJS generally addressed the contextual and historical circumstances of the child. In other words, during the settlement of one dispute, any previous offences committed by the child are equally highlighted and discussed and if necessary, appropriate compensation and/ or punishment is administered. Children who had generally had a good reputation in the community were less likely to face stiff punishment compared to those who were associated with 'bad company' or other offences in the past. In cases of offences against adults such as stealing phones or tea, the parents of the offending child are often asked to compensate the victim while the child is subjected to corporal punishment and asked to return the stolen item. In some instances, the child is asked to clean the chief's compound, the road or some other community facility.

[401] This conceptual mix up posed a challenge for the researcher because in some instances, he would leave IJS forums on the basis that a child's case was over and an adult case was coming up only to notice that the same is equally a children's case in classical legal understanding of the concept.
[402] Interview with the Kabolecho Chief-Bomet
[403] Participant observation in Bomet

6.4.4.2 Best interest of the children in marital disputes

As opposed to Kenyan state courts where the interest of the child is considered to be separate from that of the spouses[404] and are therefore addressed separately through children's and family courts respectively, informal justice systems among the Kipsigis consider the interest of the child to be inalienable from that of the parents and that of the other children in the family.[405] Any dispute between the two (or more) parents is therefore resolved together with that of the children in the same sitting.[406] The repercussions of any decision made by the IJS in marriage disputes is thus considered with regards to its implications on the children. Sometimes, the interest of the children is considered to be so paramount that it could influence the entire outcome of the dispute.

Although FJS considers the interest of the specific child who is the subject of the legal disputes IJS consider the best interest of the children (perceived collectively) rather than that of each child independently. Thus the decisions made by IJS in parental dispute cases are meant to be collectively suitable for all the children of the family (although what is considered as suitable for boys may be unsuitable for girls and vice versa). The question as to whether the children were the subject matters of the dispute is therefore immaterial. This reality is mostly pronounced where couples stay apart.

For instance in one landmark case in Kericho, the elders had to determine the extent to which a woman could leave her children in the village and join her husband in the Nairobi due to conflict between her and her mother in law. The older woman however, insisted that she could not leave for the city because this would require her to pull the children from the village schools to a school in Nairobi, an action which would be problematic as it was in the middle of the term and one of the children was about to sit for her Primary school national examinations (Kenya Certificate of Primary Education). Although the woman had expressed her willingness to leave the children with their grandmother and even threatened to leave for her maternal home unless she was allowed to join her husband in the city, the elders decided that she can only move to the city during school holidays subject to her husband's approval. The elders specifically noted that the elderly parents were too old to take care of the children and fend for themselves too. Her move to the city was therefore torpedoed on the basis of the 'best interest of the children.

Since questions of best interest of the child are usually woven into broad-based customary disputes, informal justice systems often have to address the same by first, unpacking the customary conundrum, a factor that perhaps illustrates their strength over formal justice systems which are generally limited with regard to the resolution of children disputes that encompass matters of customary law. For instance, the practice of recalling and holding up on

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[404] There is a presumed dichotomy between the interest of the child and the interest of the parents especially in divorce matters.Accordingly, it is now settled law in Kenya that divorce matters be handled by the Family Division while children matters emerging from the same petition are referred to the children's court. For illustration see C Y C v K S Y [2014] eKLR accessed from http://kenyalaw.org/caselaw/cases/view/94023/ cf F N v F M C [2015] eKLR accessed from http://kenyalaw.org/caselaw/cases/view/107327

[405] For a similar observation see Jean Zermatten, 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18 International Journal of Children's Rights 483, 489

[406] Kipsigis community, like other Kenyan communities record a high level of polygamy. It is therefore common to have a dispute between two or more wives, between the husband and his wives or among the husband, the children and the wives.

women if their husbands fail to pay bride price was found to be very common among the Kipsigis.[407] The case of Cheptoo explains this reality.

> Cheptoo was married to Denis with whom they had three children. They had lived together in Kericho town for some time but had lately returned to the village. In line with social practices, Cheptoo went to visit her parents with the children during school holidays. However, her parents insisted that she could not go back to her marital home until the bride price is paid. Since the schools were almost opening, she asked her parents to let her return the children to school but they refused. They instead told her that since bride price had not been paid, they would register the children in the nearby school as the man could not claim them without bride price. On learning of the same, the husband-Dennis sought the intervention of the chief to have the children released for school. The chief summoned Dennis and Cheptoo's parents for a dispute resolution session and it was decided that Dennis would be allowed to pay bride price in instalment since he had recently lost his job and his parents did not have any cattle. Additionally, the children would be returned to him but they could still be claimed in the future if he did not complete the payment of bride price.

As noted above, the difference between two parents or even grandparents can negatively affect the children's interest. However, a failure to appreciate the underlying dimensions of the same can compromise the realization of children's well -being. Thus whereas grandparents do not hold direct duties to children under state law, they are very important under customary law as their actions with regard to certain customary claims can compromise the well-being of children. At the same time, grandparents, as noted earlier often come in to provide social economic well-being for children in cases where their parents are unwilling or unable to do it. Accordingly, IJSs such as chiefs often employ customary law to unlock the customary bottlenecks that although primarily concerned with parents (and sometimes grandparents) negatively affect the child's best interest. Cheptoo's case reflects the many child-related disputes with a customary family law connotation. However, since Children Officers rely on formal law in resolving disputes, they only address the aspect of the dispute that violates formal state law so that unless the law conclusively addresses a children's matter it remains unresolved often to the detriment of the child. It is this realization that has promoted cross-referral of cases like Cheptoo's from the children office to the chiefs and elders.

The fieldwork also revealed that in many instances, disputes between spouses were themselves products of a misunderstanding over what constituted the best interest of the child. The elders often had to listen to the views of the two parents, then to the other family members such as grandparents and parents of the spouses before giving their input. The decision arrived at, in most instances, would be that which is approved through consensus by all the parties. The grandparents were especially important in helping the elders enforce the agreed decision. Marriage, and by extension family, is considered as a union between two clans and is therefore held in high esteem. Accordingly, divorce under customary law can only proceed subject to the approval of the parents and grandparents. Since the elders are the key players in a divorce ceremony, their rejection of the same during the dispute resolution process would basically make it impossible.

[407] Discussion with chiefs and elders in Emurua Dikkir

Because the family was considered as crucial in guaranteeing the best interest of the children (rather than child), the elders made considerable efforts to ensure the unity and stability of the family. Thus, parties who had had a child outside wedlock were largely encouraged to marry to protect the child from illegitimacy which often came with considerable stigma and rightlessness, especially in the context of inheritance. At the same time, if a woman had had children outside wedlock and subsequently married, the child was directly transferred to the man and would be considered to have lost all connections with the biological father as discussed earlier. About this, a Kipkelion VCO emphasises:

> Let us say a child is born out of wedlock. According to Kipsigis culture, the child will be considered as a son or daughter of the man who will marry his/her mother. He, therefore, has an obligation to provide for the child just as he does to his biological children. However, nowadays the men often refuse to take responsibility. They will insist on only taking care of their biological children, so when the cases come here, we enforce Kipsigis culture.[408]

Similarly, married couples were highly discouraged from divorcing as this was seen as inconsistent with the best interest of the children. In fact, according to the *Ololmasani* elders, no safeguards can be put in place to protect children outside the family context and as such, divorce should not be allowed. One elder observes:

> I love reconciliation. When the mother and father reconcile and live together, the future of the children is guaranteed but when they go apart, the future of the children becomes bleak. Sometimes, you realize that the disagreement is caused by a very small issue that can be easily resolved. If you let the issue proceed to court or delay in resolving it, they will separate and within a short time, the man will marry a second woman very quickly and the small issue will now become complicated.[409]

Accordingly, the best interest of the children was sometimes used as a basis of rejecting attempts at divorce. Part of the reason was that letting the children go with the mother after divorce (as prescribed by customary law) was inconsistent with the interest of the father, mother, the clan and the child. The identity and status of the father would be minimised by any IJS outcome which would result in him not having the custody of the children**,** first because he would be considered as having failed a test of leadership at the family level and secondly because men with children are generally considered to be of higher status than those without.[410] Similarly, a clan with many children is considered to be stronger than that with no or fewer children. Clan members would, therefore, do all that is possible to stop children from leaving the clan (including resolving disputes to avoid divorce) and promoting the birth of new ones by conceptualizing marriage as a rite of passage. A marriage dispute between two spouses was therefore seen as an existential threat to the perpetuity of the clan, as it threatened the well-being of children. Its resolution was, therefore, both paramount and immediate.

[408] Interview with VCO, Kipkelion-Kericho County
[409] Interview with Ololmasani elders in Abossi, Emurua Dikkir.
[410] Interview with elders in Kericho

Although customary law would allow a woman to leave with the children after divorce, the status of such a woman is usually minimised, first by the divorce and secondly, by the fact that she has children outside the traditional family context.[411] The level of stigma was also gendered, with women who had returned to their parent's homes with male children facing more stigma than those with female children.[412] This reality reflects how deep intersectional realities around children affect their mothers. Part of the reason for this stigma is that male children were seen to pose an inheritance threat to the children born in the woman's biological clan. Since girls do not inherit property, they were seen to be posing less competition and were generally accepted by the biological clan of the mother upon divorce or separation.[413] Accordingly, many women who divorced and left with male children often opted to take refuge in towns to escape away from customary law.[414] Since the majority were very poor, they ended up in the slums of Bomet and Kericho towns or even in Nairobi. In some instances, they opted to leave behind or return the male children once they were adults.[415] City slums and towns, therefore, became places of refuge for women escaping stigma from divorce and other cultural restrictions imposed on them by customary law. However such women were considered as fugitives from customary law by the elders and communities a factor which sometimes compromised their return either to their parents or marital homes.

Children (specifically male children) leaving the custody of their father or failing to return to the same after going with their mother during divorce, would generally be risking their inheritance.[416] Accordingly, the best interest of the male child was seen to lie with the father and not the mother. However, since customs required that all children go with their mother during divorce, especially when they are young, elders usually had to balance the contrasting interests by trying to reconcile the two spouses.[417] Reconciliation, it is believed, caters for the interest of the children, parents, family and clan.

Although the term 'best interest of the child' is foreign to the Kipsigis, it appears that the consideration of what would be best for the child is predominant in deciding cases concerning children. Accordingly, even actions (or inactions) that are considered to be inconsistent with the best interest principle at the international and national level are justified on some understanding of best interest at the community level. Thus, even parents who subjected their children to FGM and child marriage considered these to be in their best interest. This is because what is considered to be in the interest of the child, especially in the more conservative areas of the Kipsigis community such as Emurua Dikkir is social acceptance in the community. To cultivate acceptance which then translates into reciprocal relationships between the child and the community, members of the clan always attempt to ensure that both their families and themselves comply with customary standards of behaviour which may include subjecting their children to FGM.
Although court was a clear option for those who were uncomfortable with the customary conception of the best interest principle several challenges made it an unrealistic option. One challenge experienced in addressing the children matters through the courts was the question

[411] Interview with a divorced woman in Kericho
[412] Ibid
[413] Interview with elders in Kericho
[414] Interview with a divorced woman in Kericho
[415] Focus group discussion in Bomet
[416] Interview with elders in Kabolecho
[417] Interview with an assistant chief in Bomet

of time. Generally, it may take up to five years (or even more) to resolve a child maintenance and custody claim through the children's court.[418] However, since children are always developing, they often grow beyond the jurisdiction of the court so that by the time the matter is determined, the child is beyond 18 years and any order given becomes void. In other instances, the need of the child may be immediate so that by the time the order is given by the state court, the circumstances of the child have changed and the best interest is already jeopardised.[419] Accordingly, women with claims related to children's school fees or medical needs often opted for the chief or elders.[420] Chiefs and elders are also considered to have an advantage over Children's Courts because unlike the courts, they can cite customary law and obligate other relatives of the man to cater for the child in a case where the father is unable to. Of the long waiting period in court, a Kipkelion chief laments:

> I do not like the way courts proceed with these matters, in fact at a personal level, I discourage people from going to court. You know courts take a long time, unlike the elders and chiefs who usually resolve a matter within a day. Sometimes, even when the woman takes advocates and the man also takes advocates, the case will drag on and on and on until the child exceeds 18 years. By that time the child has already dropped out of school and is now a nuisance in the community. So, if we the chiefs and elders cannot solve the case, I usually prefer a resolution at the children's office. This usually enhances reconciliation and is faster.

6. 4.4.3 Best interest of the child and traditional liquor production/consumption

According to the Alcoholic Drinks Act, 2010, selling alcohol to children is illegal and attracts a one-year imprisonment or a fine.[421] However since childhood under customary law is considered on the basis of body size, school attendance and undergoing of traditional ceremonies, instead of the National Identity Card or Passport as provided by the Act, traditional brewers often sell the commodity to children (whom they consider to be mature enough to use it). The fluid customary conception of childhood has thus compromised the enforcement of state law with regard to the sale of traditional liquors. Thus, whereas the state generally regulates bars and other alcohol outlets by ensuring that they do not sell alcohol to children, regulating the sale of traditional liquor to children has remained problematic.[422]

The proliferation of traditional liquors and the fact that non-school going children can easily access them results into a wider abuse as children often buy and share it amongst themselves. Accordingly, schools often have to call for the intervention of the chiefs in cases where school children use traditional liquor and either come to school drunk or carry it to school. Although teachers also reported cases of children consuming traditional liquor to the chiefs, such cases could not proceed without the child's parents or relative(s). This is because the child was seen as not being *suis juris* and strictly subject to the parent so that an offence committed by the child was partly attributed to the parent or guardian.

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[418] Discussion with magistrate in the children's court-Sotik
[419] Discussion with children officer, Sotik
[420] VCO Kaplong-Bomet
[421] S 28
[422] Deputy County Commissioner-Bomet

Reports by teachers were 'taken more seriously' and often resulted in immediate corporal punishment and a requirement that the child reports to the chief regularly. In the eyes of the teachers, especially primary school teachers, the best interest of the child was best guaranteed by having the chief punish the child as the option of the police was considered too radical and unpopular. Generally, teachers also reported such cases as a way of compelling the chief to crack down on the production of traditional liquor within their jurisdiction.[423]

Traditional brewers wield a significant level of influence in the community. The fact that their traditional liquor is generally cheap coupled with their acceptance of barter trade - the exchange of grains or household items for alcohol, often made them quite popular. At the same time, the brewers acted as quick sources of soft loans to parents whenever their children were sent home for school fees, or to any other member of the community who was in need of quick funds. Accordingly, they often received protection from the chief against the police either through commission or omission. The fear of losing popularity often made the chief generally unwilling to intervene robustly against traditional brewers. Whenever the cases of liquor abuse by children were presented before the chief by teachers, the chief had the task of balancing between his/her interest (social acceptance in the community) which determines whether community members would continue presenting cases before him, the interest of the children, the interest of the state and the interest of the community. The interest that took a central position largely depended on the personality of the chief and the risks involved. One common compromise was usually achieved by prohibiting the sale of the liquor to school going children while leaving it open for everybody else (including non-school going children).[424] Part of the reason for the protection of school-going children was that any non-intervention by the chief would result into teachers escalating the matter to the Assistant County Commissioner, or Sub-county Education Officer, an eventuality that would almost certainly result into the interdiction of the Chief by the state. However, non-school going children were less protected by state agencies and even by the community as they were considered as grown-ups or 'spoilt'.[425] There was a claim, however, that once non-school going children accessed the liquor, it easily ended up in the hands of school-going children.[426]

Chiefs who stuck to the legal conception of a child (individuals who are below 18 years) were often vilified and victimised as they generally ended up in conflict with most of the brewers and their clients. In one instance, members of the community utilised the lawlessness occasioned by the 2007-2008 post-election violence to set on fire the chief's homestead in Kaptengecha village, Bomet County due to his heavy crackdown on traditional brewers. [427] The other problematic question was the protection of the best interest of the brewer's children. A number of chiefs interviewed in the study noted that brewers argued that the production of the alcohol was an economic endeavour that was meant to uplift the status of the family and fulfil

[423] Conversation with a chief in Kaptengecha-Bomet. Locally produced alcohol and several other traditional brews are considered illegal by law and Chiefs often have the mandate to arrest and hand over the brewers to the police.
[424] It is noteworthy that under state law, the sale of alcoholic products to all children, regardless of their education status is prohibited.
[425] During data collection the Swahili word *mtoto ameharibika*- 'the child is spoilt' was widely used to indicate irredeemable deviance or delinquency in children and was distinguished from *mtoto amekosa* (the child has committed an offence or made a mistake). The two attribute attracted different forms of consequences for the child.
[426] Focus group discussion in Sigor
[427] Interview with Kaptengecha Chief-Bomet

their obligations to the children, including buying food, clothing and paying school fees.[428] In many instances, the traditional brewers worked with their children during the production process. In other instances, the children were involved in serving the liquor to the consumers a practice that was blamed for the widespread alcoholism among children in the study area. The challenge for the chiefs, therefore, lay in striking a balance between the legal requirement that children should not be exposed to alcohol and the capacity of traditional liquor production to meet the financial needs of the families including payment of fees for children.

Sometimes chiefs kept away from arresting or reporting such brewers to the police for fear that an arrest, prosecution and imprisonment of the parents in line with the Alcohol Control Act, 2010, would result into the children suffering more due to the absence of their parents. Although family members usually came in to care for the children in the absence of their parents, traditional brewers were usually the breadwinners of their nuclear and wider families. Accordingly, their arrest, prosecution and imprisonment would make it impossible for the children to access the same level of care resulting in children dropping out of school or engaging in child labour to find alternative means of survival.[429] Chiefs, therefore, had to balance between, on one hand, the legal requirement that children should not be exposed to liquor, the children interest in education, general welfare and interest of the brewer's family. The choice over the manifest interest, just as stated earlier, depended on the ideology of the chief including whether he was also a consumer of the traditional liquor. Generally, younger chiefs and chiefs who were practising Christians were more hostile to the brewers and consequently were more unpopular in the community than the older ones or the non-practising Christians. On the other hand, the Christian chiefs were perceived as less corrupt.

The dual identities of the chiefs, on one hand as custodians of customs by virtue of their community membership and on the other as state agents, interacted with socio-economic and cultural realities at the community level to produce a contextualised understanding of the best interest principle. The following section furthers this discussion by looking at the question of corporal punishment.

6.4.4.4 Best interest of the child, corporal punishment and children in conflict with (customary) law

Notwithstanding its long term negative consequences on the well-being of the individual, and its prohibition and state and international law as discussed in chapter three, corporal punishment was found to be very prevalent among the Kipsigis. In fact, most participants interviewed considered it to be the primary means of punishing children. The prevalence of corporal punishment even in the face of the promotion of verbal correction and counselling by some NGOs and some government departments was found to be tied to the adult-child dichotomy in which adults are seen to have absolute power over children. Thus because children were considered to be inferior and mentally incompetent, most Kipsigis parents felt that holding any meaningful discussion with them over specific offences was unnecessary.[430] In the words of one Emurua Dikkir parent, 'the only language that children in this area understand is the language of the cane.' To understand the entrenched position of corporal punishment under

[428] Conversation with chiefs in Bomet
[429] Interview with Mogor Assistant Chief
[430] Focus group discussion in Emurua Dikkir

customary law, it is prudent to first explore the customary understanding of the practice among the Kipsigis. James' case provides an important background.

> James, a 20-year-old man who was still considered as a child because he was not married, was reported to the chief by his parents for stealing and selling his brother's building materials. The brother was a teacher in Kericho town and only came home during the weekends.[431] The intention of the parent was to have James caned and released to go home. James in his defence observed that his parents did not love him because they allowed him to drop out of school while his siblings progressed to college. To this, the parents noted that they had persuaded him not to drop out of school, but he was adamant, having ventured into the consumption of traditional liquor. To this, James responded that they should have caned him just like they did to his siblings. He wondered why they were harsh on the others but lenient on him and blamed his joblessness on their unwillingness to cane him when he was a boy.[432]

Although he was drunk during the hearing process, the issue that he raises revisits the highly contested question of whether best interest implies immediate or long term interest under customary law. Under state law, a statement given under the influence of alcohol is considered as inadmissible.[433] However, to the extent that the individual can speak coherently, informal justice systems would generally accept such a statement especially if the same is corroborated by the elders, chief or by other witnesses. Since the elders, as members of the community were privy to James' upbringing anyway, they generally accepted his testimony notwithstanding his drunkenness.

In spite of assertions by UNICEF, Save the Children and scholars like Heather Turner and Paul Muller that corporal punishment is linked to depression, poor academic performance and violent tendencies in the long term,[434] IJS among the Kipsigis considers it to be an appropriate discipline mode. James assumption, that his best interest at age 20 would have been guaranteed by a violation of what state law and international law presumes to be in his interest at childhood-protection from corporal punishment, therefore, raises controversial questions on the long term

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[431] Ordinarily many people in Africa who work away from home rent or buy houses in town and also build a house in their ancestral land. In local discourses, the dwelling place in the city is considered as a house while the home is the house in the ancestral land or rural area.

[432] On interviewing the parents, they admitted that they were less strict on him but noted that he was the last born child and therefore their favourite.

[433] Case law has been fairly tolerant to drunk witnesses, noting that to the extent that it does not impair mental functionalities such a witness is credible. For details see Charles Ndegwa Njeri v Republic [2012] eKLR cf Jacqueline Evans, Nadja Schreiber Compo and Melissa Russano, 'Intoxicated Witnesses and Suspects: Procedures and Prevalence According to Law Enforcement' (2009) 15 (3) Psychology, Public Policy, and Law 194, 215, cf Nadja Schreiber Evans Jacqueline, Carol Rolando, Villalba Daniella, Ham, Lindsay, Garcia Tracy & Rose Stefan (2012)'Intoxicated eyewitnesses: Better than their reputation? (2012) 36 (2) Law and Human Behaviour 77 accessed from http://dx.doi.org/10.1037/h0093951 on 15 March 2019

[434] Heather Turner and Paul Muller, *Long-Term Effects of Child Corporal Punishment on Depressive Symptoms in Young Adults: Potential Moderators and Mediators* (Save the Children 2005) 4 accessed from https://www.unicef.org/easterncaribbean/spmapping/Implementation/CP/Global/Punishment_manualaction_Save_2005.pdf cf Maria José Oganda Portela and Kirrily Pells, *Corporal Punishment in Schools :Longitudinal Evidence from Ethiopia, India Peru and Vietnam* (UNICEF Innocenti 2015) https://www.unicef-irc.org/publications/pdf/CORPORAL%20PUNISHMENTfinal.pdf

implications of corporal punishment, especially at the grassroots level where it is normalised and approved. It is such hindsight approaches to the best interest principle that have elevated the practice to a desirable and 'fruitful' means of bringing up children among the Kipsigis. This approach to best interest although plausible under customary law would easily be rejected by child rights scholars who have already criticised adults for shaping the discourse on children without actively involving the children.[435]

As noted above, the position of Kipsigis customary law with regards to corporal punishment is largely at variance with international human rights law. Under Kipsigis customary law, some level of corporal punishment is considered to be in the best interest of the child. Part of the reason is that under Kipsigis customary law, the child is considered to belong to the parent, the family and the clan (contrary to international human rights norms).[436] However, customary law also had a limit as to what justified corporal punishment and the intensity of the punishment. An intense level of caning was considered as threatening and therefore undesirable just as administering corporal punishment for minor offences was seen as unsuitable for child well-being. In some instances, relatives and neighbours often intervened to 'save' the child from extreme forms of corporal punishment, especially if the offence was perceived as trivial such as eating the available family food without the consent of the parent.[437]

Due to interdependent and collective child upbringing, all adult members of the wider family have an obligation to punish the child including subjecting him to corporal punishment. According to the chiefs and elders, the 'right' to punish children has been narrowing over time, from the 'traditional' position in which any member of the community or village could punish an errant child, to the current status where the same is preserved for the members of the wider family or in a few instances, members of the clan. The justifications for this varied widely. On one hand, there is an argument that if not punished, the child will become a criminal and therefore threaten the peace and well -being of all the family and clan members.[438] This argument posits that once this occurs the clan will have the burden of shouldering all his/her misfortunes as they will be expected to compensate all his victims. On the other hand, members of the Kipsigis community also argue that because clan members have a collective responsibility to care for the children, including the guarantee of basic needs, the same is characterised by an obligation to punish the child so that for instance, 'they do not drop out of school and waste their school fees'.[439] The Kipsigis thus see corporal punishment as a way of socializing the child into responsible adulthood and communicating the boundary between acceptable and unacceptable social norms. As observed by David Clark, collectivities use persuasion and ideological control, coercion and recommendation to regulate the conduct of members.[440] Accordingly, other forms of sanctions such as cultivating the farm, denial of food or withdrawal of other forms of support were also meted against children. However, these were largely complementary to corporal punishment. Thus although the argument that corporal punishment may be in the best interest of the child has been rejected by international human

[435] For such an argument see Matias (n 366)
[436] See for instance Committee on the Rights of the Child, (n 179) par 40 and 47 cf Stuart Hart, Joan Durrant, Peter Newell and Clark Power (eds) *Eliminating Corporal Punishment the Way Forward to Constructive Child Discipline* (UNESCO 2005)
[437] Conversation with VCO-Bomet
[438] Focus group discussion in Kapsosian-Emurua Dikkir
[439] Interview with a parent in Mogor- Emurua Dikkir
[440] See David Clark, *Encyclopeadia of Law and Society* (Sage 2007) 743

rights agencies, members of the Kipsigis community considered it to be in the best interest of the child.

At the same time, it is important to note that state law considers 8 years to be the age of criminal responsibility for children.[441] Accordingly, children who are 8 years and above and who are accused of committing criminal offences including but not limited to theft are meant to be treated in line with penal law. They are thus arrested, taken to a remand facility then to court and if found guilty, sent to a rehabilitation school or to a borstal institution depending on their age and gravity of the offence. The presumption of the Children Act, 2001 and the Borstal Institutions Act is that sending 8-year-old children to the children's corrective institutions is consistent with the best interest of the child. However, this situation has been condemned by among others, the Committee against Torture, UNICEF and the Committee on the Rights of the Child which have repeatedly asked Kenya to raise the age of criminal responsibility and reduce the rate of child incarceration.[442] To date, no action has been undertaken towards compliance with these recommendations. However, under Kipsigis customary law, 8-year-old children and indeed all children, are presumed not to have agency and as such are not criminally responsible for their actions. As noted earlier, they are seen as developing human beings who need guidance and correction. Corporal punishment is therefore considered as an acceptable means of correcting the child while adhering to the community's obligation to guide and nurture them.

An analysis of the child corrective institutions illustrates that they are not only congested but also underfunded and largely scattered across the country**.** There are only 11 rehabilitation schools two borstal institutions and 11 juvenile remand homes in the whole country against a population of 20 million children.[443] None of the three counties in the study have borstal institutions or rehabilitation schools and often convicted children have to be transferred to other counties. Child remandees are often held at Kericho Prisons while others are held in police stations. The poor state of police stations often means that children are held together with adults in the same cells an issue that undoubtedly violates the best interest principle and has equally attracted criticism from human rights agencies. These sentiments are acknowledged by the Children Officers who are often caught between surrendering the children to the poorly funded institutions and referring them back to the IJS where corporal punishment is prescribed. It is noteworthy that corporal punishment is also administered in the corrective institutions subject to the Borstal Institutions Act (and at least according to available research) therefore negating any human rights impetus for having children held in the institutions.[444]

Since borstal institutions allow corporal punishment of children, they are no different from the informal justice processes from which the state is ostensibly saving children. In fact, according

[441] Sec 14 of the Penal Code
[442] See Committee on the Rights of the Child (n 179) par 75 cf Committee against Torture, 'Concluding observations of the Committee against Torture: Kenya' accessed from http://www.refworld.org/docid/4986bc0bd.html. Cf UNICEF, 'Taking Child Protection to the Next Level in Kenya' accessed from https://www.unicef.org/protection/files/Kenya_CP_system_case_study.pdf p 15
[443] For statistics on Kenya population ,see http://inequalities.sidint.net/kenya/abridged/demographics/
[444] See for instance Odongo (n 188) cf UNICEF: *Hidden in Plain Sight: A statistical Analysis of Violence Against Children* (UNICEF, 2014) accessed from http://files.unicef.org/publications/files/Hidden_in_plain_sight_statistical_analysis_EN_3_Sept_2014.pdf

to some children officers, the poor hygiene conditions of the institutions coupled with poor services and underfunding creates a need to divert children away from the formal justice processes.[445] Since the schools within these institutions are understaffed, children who are taken there are only offered basic education services and many of them have to contend with informal education such as carpentry, masonry and other similar trades which are much more available.[446] In practice, formal education is only reserved for children who are preparing for the national examination (grade seven or eight).[447] The institutions do not have libraries, laboratories or other facilities available in other public schools. Because the state does not send enough trained teachers to these institutions, children who are sent there largely suffer at the hands of prison officers who sometimes double as educators.[448] Even when educators are deployed, they only focus on basic primary school education. Children who want to proceed to secondary school have to wait until they exit the institutions or study on their own with only minimal instructions. These observations of Children Officers corroborate the findings of UNICEF in previous researches on the institutions.[449] According to UNICEF all categories of children, ranging from street children to child offenders are held within the same spaces regardless of the nature of their offences.[450] Within this context:

> Serious offenders might negatively influence other children who are there simply because they are homeless, abandoned or orphaned. Although approved schools (now called rehabilitation schools) are supposedly aimed at educating and rehabilitating children for return to society, the schools reputation for being little more than a children's prison makes it difficult for children to find employment and acceptance when they are released.[451]

It is on the basis of such realities that communities are generally reluctant to have their children taken to the corrective institutions. Most parents and children interviewed during the study considered corporal punishment by the chief to be much more acceptable and therefore in their interest compared to the rehabilitation schools and other legal responses.[452] The study further observed that even when children expressed negative sentiments about corporal punishment, they rejected it either because the caning was more intense relative to the offence committed, or because they argued that they did not commit the offence for which they were being punished.[453] There was generally no concern over the moral, normative or legal foundation of corporal punishment even among children. Part of the reason could be that the normalization of corporal punishment in Kipsigis customs has elevated it to an acceptable social practice over

[445] Interview with Children Officer, Sotik
[446] Ibid
[447] Horace Chacha, 'Treatment and Social Reintegration of Offenders: A Case Study of Shikusa Borstal Institution' (Paper Presented at the United Nations Far East Institute for the Prevention of Crime and the Treatment of offenders ,n.d) 140 accessed from https://www.unafei.or.jp/publications/pdf/13th_Congress/24_Kenya.pdf on 5 February 2019
[448] Probation officer-Bomet
[449] UNICEF, 'Rights at Risk: Issues of Concern for Kenyan Children' accessed from https://www.unicef-irc.org/portfolios/documents/785_jj_ngorep_kenya2.htm
[450] Ibid
[451] Ibid
[452] Interview with parents at the Chiefs Camp in Mogor-Emurua Dikkir.
[453] Conversations with Children in Bomet

which children are expected to comply as part of their customary obligations.[454] Of corporal punishment an assistant chief in Emurua Dikkir observes:

> There is a child that I caned here several times for jumping across peoples fences and stealing petty items. Eventually, I reported him to the police. The police worked on him and he came here saying ''at least you used to cane me just a little bit, the police caned me excessively''. Since then he has changed and is performing well at school. You remember, for everything he stole, the parents paid so now even the parents are happy with me.

Two forms of compensation by the parent characterise the corporal punishment of a delinquent child. Firstly, the parent has to pay the full amount of the stolen item. This amount is usually paid to the owner of the stolen property, the victim of the child's offence, or in case of offences against other minors, the parent of the offended minor. The payment can be done in cash or in the form of cattle and (or) grains.[455] Sometimes the child is asked to work on the farm of the victim for a duration that is equivalent to the amount of money the parent would have paid for the offence. This especially happens in cases where the offending child comes from a very poor family. Secondly, the parent has to pay the elders fee which is averagely Kenya Shillings 200 (Approx.2 euros) per elder.[456] The money is partly a fine, for not properly bringing up the child, and compensation to the elders for their time. According to the Bomet Township assistant Chief:

> Sometimes parents fail to bring up their children properly. For instance, you will find situations where the child steals from people and brings the stolen items home. The parents would automatically know that she did not buy them but would just entertain him. In such cases, we punish both the parent and the child. All parents have a responsibility to teach their children good manners. If they do not, then they have to pay for the items that are stolen by their children… If a child steals chicken, and takes it home, the parent should be able to see that chicken before it is sold. She can then return it to the owner or report to us. If she does not, then she will have to pay.

It was also noted that whereas chiefs would also receive the elders' fee in adult cases, the fine given in children's cases would be shared exclusively by elders except in cases where the chief was the sole dispute resolver. Due to the low status given to children matters the cases were generally slotted in between other cases, before or after cases concerning adults resulting in overlapping audiences.[457]

Parents in most cases considered corporal punishment of their children to be a form of a rehabilitation process and preferred it over the police option because it was fast, took less time, was compatible with education and had an immediate outcome. They were more comfortable with informal justice and saw it as being suitable for children because it retained their child

[454] For a discussion on how certain practices can be normalised to become part of informal law, see, Clark (n 440) 742-743
[455] Participant observation in Emurua Dikkir.
[456] This could be varied upwards or downwards depending on the economic status of the parent, the duration and nature of the case.
[457] Participant observation in Mogondo, Emurua Dikkir

within the ambit of the community as opposed to the more formal justice systems that removed the children from the community into other parts of the country. According to the study participants, children who are taken to rehabilitation schools often returned much worse than they left and are generally more undisciplined.[458] This reality tends to confirm the findings of UNICEF which observed that because children are all lumped up together regardless of their offences, some children are likely to develop more aggravated delinquent tendencies as a result of the negative influence of the others.[459]

The preference for corporal punishment over formal processes in dealing with child offenders often results in parents seeking the help of the chief to 'discipline their own errant children'. Such parents, fearing that the stealing tendency will exit the home into the community and result into the child landing into the hands of the police or court and finally to rehabilitation schools in line with state law, often consider corporal punishment by the chief to be an easier option. Often the parents report the matters to the chief, not necessarily as a claim against the child but to have corporal punishment administered on the child. In the words of one parent, 'You sometimes have to report these children to the chief so that they may know that their misbehaviour is no longer a private affair but that it has now reached the ears of the government'.[460] Accordingly, the mere fact that a child's case has been reported to the chief, regardless of the action taken, is in itself a form of deterrence. At the same time, the chief is considered to hold the moral position of the community on any matter. Accordingly, parents often want them to re-affirm the illegality and immorality of the deviant behaviour to the children. chiefs thus doubled as counsellors and advisors to child offenders. One assistant chief poses:

> The Children's Court is very far, and then the police are usually reluctant to arrest these children. Sometimes parents bring their children here and say 'please just cane him for me', he will be scared and will never repeat the offence. A common offense that we end with caning is that of children refusing to go to school. Sometimes we cane them and order them to report here every evening from school or every Saturday or sometimes even every day before going to school. This is usually after agreeing with the parent.[461]

It was also observed that in many instances, the police were unwilling to investigate and prosecute children matters. This is because they considered their offences as being d*e minimis non curat lex* [462] and therefore not warranting legal intervention. Accordingly, many cases presented before the police often resulted in the child being caned and asked to return home or in some cases the entire cases are referred back to the chief by the police (for caning and comprehensive resolution).[463] Such cases included those of assault of one child by another, 'minor' forms of theft such as first-time theft and selling of household items or crops.[464] However, it is noteworthy that the police are only considered as the very last option and often after the exhaustion of all other mechanisms.

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[458] Interview with the Chief of Mogondo-Emurua Dikkir.
[459] UNICEF (n 449)
[460] Bomet parent during an interview.
[461] Assistant chief in Sigor-Bomet County
[462] The law does not care for, or take notice of very small or minor matters.
[463] Conversation with police officers in Kericho
[464] Conversation with a police officer in Kericho

Part of the reason why IJS processes, despite meting out corporal punishment on children, are considered to be in the best interest of the child relative to the formal justice systems is because the formal justice systems are considered to be very strict on children. Thus, an offence of theft committed by a child is tested against the penal code under state law just as the one committed by an adult. However, in the eyes of the community, children largely steal food materials or small amounts of money which do not warrant the intervention of the courts or the police. Instead the same is seen to require corrective action such as corporal punishment.[465] One *Kokwet* elder in Kapsosian observes:

> It is poverty that makes children steal and makes it difficult for men to care for their children. Adults steal to be rich, but children steal for food. For instance, poverty has increased here due to this armyworm which has eaten all our maize and drought that has resulted in poor harvest for many months now. Therefore, hungry children steal food items a lot or steal petty items, sell and get money to buy food. We cannot take all of them to the police. We just cane, warn and let them go home.[466]

Accordingly, even when arrests are made by the police, community members are often unwilling to appear as witnesses in court against children. Appearing as a witness or complainant in court against a child from the community is considered as vengeful and trivial and is highly disapproved of. In many instances, the parents of the child would often compensate the victim even after the matter has gone to court resulting into the withdrawal of the case by the victim. All these factors have collectively contributed to the reluctance of the police to handle children cases. At the same time, the unwillingness of the community to let children interact with formal justice systems, coupled with the social acceptance of corporal punishment has fuelled its use as the primary means of discipline among informal justice systems and families.

6.5 Summary

This chapter has explored the nature and dynamics of the best interest of the child principle among the Kipsigis. It has highlighted the inconsistency between customary conceptions of best interest and state conceptions of the same and denoted how in view of this inconsistency, members of the Kipsigis community utilize customary law to promote the best interest of the child and how this may in actual practice be at variance with the well-being of the child. It highlighted the key pillars of best interest under customary law such as; promotion of harmonious co-existence with the family, guaranteeing the long term interest, adherence to customary obligations by the parents and a contextual consideration of the child's best interest. At the same time, the chapter has illustrated how customary best interest is protected during disputes involving children and marital disputes as well as how the principle interacts with children's participation in the brewing and consumption of traditional liquor and corporal punishment.

[465] Kokwet elders-Mogor.
[466] Kapsosian elder.

It must be emphasised that the state is both psychologically and normatively distant from the citizens. Psychologically because the systems and sometimes even language of state agencies is inconsistent with local realities and physically because accessing the state services require immense financial and time investment. Accordingly, the most practical option for vulnerable Kipsigis children is to access services through clan and family members. Within this context, the best interest of the child is best protected by aligning him/her to the local agents that s/he interacts with daily and claims well-being from than with an absentee state. Such a reality introduces customary conceptions of best interest that the child has to comply with. Having explored the concept of best interest under Kipsigis customary law in general, the next chapter examines how intersecting factors overlap to compromise this interest and how an intersectional analysis of these interests and challenges can generate subtle knowledge on the question of best interest and well-being under customary law.

CHAPTER 7

Intersectional nature of child abuse and child protection among the Kipsigis

7.1 Introduction

One of the objectives of this study was to explore the suitability of rights talk in guaranteeing the best interest of the child. Chapter three partly responded to this objective by observing that the failure of human rights law both at national and international level to appreciate the intersectional nature of childhood and child abuse makes rights talk unresponsive to the plight of grassroots children, such as Kipsigis children. This chapter builds upon this foundation and uses intersectionality to explore child abuse and child protection among the Kipsigis. At the same time, this chapter builds upon the findings of the previous chapter with regards to the different ways through which informal justice systems and customary law identify and protect the best interest of the child. An intersectional analysis of child abuse conducted in this chapter is justified on the basis that children are not all equal and each category of children suffers forms of abuses that emerge from their multiple identities. This approach, therefore, contributes to the broader objective of examining the extent to which customary practices violate (or promote) children rights and the way in which informal justice systems respond to child rights through the use of the principle of best interest of the child.

Section one uses intersectionality to explore the question of lost childhood for boys and girls and how customary law constructs and respond to this reality. The second section explores regional variations of child abuse and highlights how regional factors among the Kipsigis such as poverty interact with customary law to create and limit opportunities for boys and girls in different parts of Kipsigis land. It proceeds to highlight the nature and dynamics involved in the most dominant forms of child abuse such as child marriage, teenage pregnancy, domestic violence and child labour. The chapter moves from a descriptive analysis of the various forms of abuse to an evaluation of how the various forms of abuse reinforce and (re)produce each other through a systematic interaction of various intersectional factors. It demonstrates how the expectations on one gender of children not only overburden the other but also how it reproduces intersecting outcomes that negatively affect the well-being of differently positioned children. Similarly, the section highlights how the persistence of bride-wealth as a customary means of validating marriages has fuelled child marriages. The section concludes by exploring the different ways through which the gender of the child influences violence against mothers and how the interests of the mother are tied to that of the child in the context of gender-based violence. The third section explores the various forms of offences committed by and against boys and girls and how informal justice systems respond to them as well as how in some instances, informal and formal justice systems corporate with each other and (or) undermine the interest of the very children they try to protect. The chapter concludes by summarizing the key observations and the extent to which they respond to the research questions and objectives.

7.2 Intersectionality and lost childhood among the Kipsigis children

Childhood, being a development stage is an entitlement for all children both under customary and state law. It is characterised by the freedom to make mistakes, play, and receive care and protection. The Kipsigis child could expect to experience all of these on the journey to adulthood. At the same time, the Kipsigis society confers certain expectations on and obligation to children. This section explores how these duties and obligations assigned to children result in the loss of their childhood. Lost childhood is said to occur when disruptive events occur in the life of a child, therefore, conferring upon the child adult responsibilities at an early age or rob the child of the capacity to experience elements of childhood such as education and play.[467] Such disruptive events may include the involvement of the child in conflict/war in which the child and parent's psychological identity are merged through homogenous experiences, to situations in which a child has to develop an adult's psychological identity to be able to deal with the adult situation in which s/he finds himself/herself in, such as in cases of child marriage or child labour.[468] To respond effectively to the research objectives, and due to the fact that boys and girls experience lost childhood differently, this research explores lost childhood among boys and girls separately.

7.2.1 Lost childhood among Kipsigis girls

The location of Kipsigis girls at the intersection of childhood and womanhood generates dynamics that bring about child abuse. On one hand, a Kipsigis girl faces discrimination emerging from her identity as a child and on the other, she faces discrimination as a woman. Once her childhood evaporates due to the conferral of adult responsibilities that results from her identity as a child bride or teenage mother, she is immersed in full adult expectations and is generally exposed to gender-based violence. Thus, although both children suffer from what state laws consider to be inhuman and degrading treatment in childhood, such as corporal punishment, girls transition from corporal punishment in childhood (characterised by the state as violence against children) to gender-based violence upon marriage and from being owned by the parents to being owned by her husband and his clan. Their agency is therefore minimised by the transition across two patriarchal Kipsigis systems. This eventuality is worsened by the high level of poverty which often means that the conferral of adult responsibilities compels the girl to embrace adult female responsibilities such as caring for and feeding the family. At the same time, since girls are expected to care for the family by performing domestic roles together with their mothers, they transition from caring for their biological families to cooking for their husbands' families.

Child marriage and teenage pregnancy are self-reinforcing. Child marriage promotes teenage pregnancy just as teenage pregnancy promotes child marriage as the pregnant girl is often married off to save the family from embarrassment. Children who beget children as teenagers lose their childhood. On one hand, they are considered 'spoilt' and therefore cannot play with the other children. They are stigmatised and have to stay at home with their parents, a reality which translates into more work for them as they have to cook and clean the clothes of their siblings who would either be in school or playing. On the other hand, adult women consider

[467] Cf Jeffrey Prager, 'Lost childhood, lost generations: the intergenerational transmission of trauma' (2003) 2 (2) Journal of Human Rights 173, 174
[468] Cf Ibid

teenage mothers to be young and are often unwilling to interact with them. They are in many instances, unable to join women self- help groups *(chamas)* because firstly, they are generally considered to be too young and secondly they can neither make any financial or non-financial contribution as they do not own or control resources. This lack of resources sometimes pushes them into child labour, not necessarily to be able to join the *chamas* but because they need to find a means of survival for their children, a factor which further alienates them from their childhood.

Although the government has put in place the return to school policy which allows teenage mothers to transfer to any school of their choice, it has not established enough safeguards for such children and their babies.[469] Accordingly, the girls cannot claim these opportunities and return to school; first, because schools do not have baby care units and secondly, because in most instances parents and family members often fail to offer any support to the baby forcing the girl to stay behind and care for the baby and thirdly, because parents often completely withdraw from fee payment forcing the girl to drop out.[470] Part of the reason is that teenage mothers are considered to be 'spoilt' and thus in the face of financial scarcity in the family, are often overlooked in favour of the other children.

Accordingly, the childhood of a teenage mother is often lost as she struggles with the intersecting challenges of motherhood, childhood and adulthood. In principle, her existence at the intersecting boundary between childhood and adulthood only serve to worsen her situation as on one hand, she is considered not to have the full agency (and resources) of an adult and on the other hand she is considered as not being a child proper due to her status as a mother. The study findings established that both the formal and informal justice processes are generally unsupportive of such mothers. On one hand, they cannot bring maintenance or school fees claims against their parents before the IJS as they are generally judged to be 'spoilt' and therefore not warranting the intervention of the elders or parents. On the other hand, they cannot seek the intervention of the formal courts as they lack a locus standing in court due to their status as children.

Their exit from the education system often robs them of any community-based protection that is accorded to school-going children. Similarly, children officers are generally less likely to intervene as they see their intervention to be a threat to their continued stay in the family which they consider to be in their best interest. Within this context, most teenage mothers have to navigate between staying with their parents and spending time with their grandmothers. This exclusion of teenage mothers from protection, however, varies depending on the level of poverty in the family. It was thus observed that girls from poor families generally suffered more stigmatization, including withdrawal from school as opposed to those from richer families. Those with more educated parents such as the children of teachers generally found more social support at the family level.

The study also noted that girls drop out of school to become house helps to their relatives in towns and cities and send the money home to feed their parent and siblings.[471] Thus, the intersecting issues of gender and childhood interact with that of poverty to vaporise the childhood of teenage mothers and girls who are introduced into the labour economy to mitigate

[469] Conversation with Children Coordinator, Kericho
[470] Ibid
[471] Children officer, Sotik

against family poverty and help the other family member cope with it. Their identity as independent beings is therefore obscured by the interest of the family and clan.

Although primary school is basically free, the absence of sanitary towels often means that many girls miss several days from school during menstruation resulting into cumulatively poor performance, which discourages them from school, eventually resulting in them dropping out. In the face of poverty and limited resources parents often sacrifice the education of girls and concentrate on that of boys. Even when boys perform poorly, their education is not sacrificed in favour of the girls' as they are considered as a future investment for the family. Boys, therefore, have an undue advantage regardless of their academic performance and can only be disadvantaged by other boys with a better performance in the family.

7.2.2 Lost childhood among boys

The roles associated with men, such as providing for the family and defending the community often intersects with the child's identity as a boy resulting in adult expectations on the child. Within this context, the boy-child is compelled to drop from childhood, a highly protected stage to adulthood in which he is now the source of care both for his family as well as his parents and siblings. The conferring of masculine obligations at childhood, coupled with the masculine expectations of behaviour often leads the boy to actions that may result in the evaporation of his childhood. Thus, when such disputes end up before the IJS, the focus is never to challenge the male masculine role conferred to the child such as those allowing him to marry at a young age. Instead, IJS often focuses on mitigating the challenges that emerge from the manifestation of those attributes.

Intersecting set of challenges more negatively affect the boy-child in Emurua Dikkir relative to the boys in Bomet and Kericho. Thus, on one hand, a boy in Emurua Dikkir suffers a lack of adequate education and health opportunities by virtue of the historical marginalization of Emurua Dikkir and Chepalungu. On the other, he is exposed to poverty and often has to miss school (and sometimes drop out altogether) to help meet the economic needs of the family through child labour, a situation which often leads to him having to marry at an early age.

Pastoralism, characterised by rampant cattle rustling in Emurua Dikkir is also responsible for lost childhood among boys. Cattle rustling is the main trigger of ethnic violence between the Kipsigis in Emurua Dikkir and the Maasai who inhabit the other parts of Narok County. One of the main factors that fuel cattle rustling is child marriage. The demand for a high bride price for a girl is not only premised on economic reasons but is also considered as a means of raising the profile and status of the girl and therefore protecting her from domestic violence.[472] However, this demand has the unintended consequence of having the boy (or the man) engage in cattle rustling or other forms of child labour in order to obtain enough cattle for bride price payment.[473]

Cattle rustling often results in counter-rustling as the two communities try to trace or revenge for their cattle.[474] Accordingly, as a practice, whenever this happens, authorities have to trace and return the stolen cattle and organize peace meetings between the two warring communities. Prolonged ethic conflict often occurs in situations where the animals are not returned or where

[472] Interview with elders in Emurua Dikkir
[473] Ibid
[474] Conversation with Assistant County Commissioner, Ololmasani.

a member of the community is killed during cattle rustling. Since cattle rustling is usually conducted by young people, male children are mostly associated with the same.

Kipsigis boys between ages 15-18 often join other young people in conducting cattle raids in neighbouring Maasai and Kisii communities.[475] In the process, some are killed resulting in revenge killings by the Kipsigis, an action that is similarly undertaken by young men. In the instances where the community is attacked by the Maasai or Kisii who are pursuing their cattle, it is the young people who are expected to defend the community.[476] Accordingly, boys often have to miss school and join other young men in defending the community. Due to the intensity of the violence, schools along the borders are often forced to close as a security measure.[477] Since border schools are often attended by children from both warring communities, the best interest of the children, especially with regards to school opening is usually central to the dispute resolution by the elders who are often involved in the peace process.

According to the local administrators, re-opening of the schools usually marks the first step towards the return to normalcy and is usually considered as one way of maintaining cross border harmony at least because schools are rarely attacked by the bandits since they generally have children from both communities.[478] Thus, cattle rustling affects boys in two ways: It results into the closure of schools resulting in all children having to stay at home and the boys often have to stay away from school as many of them are involved in cattle rustling or defending the community.

The high level of poverty in Bomet and Emurua Dikkir often compels boys to drop out and become breadwinners of their families at a young age. One of the activities that the boys engage in is cattle rustling.[479] It is also noteworthy that in many families, children born to second, third or fourth wives often suffer the brunt of poverty because their fathers are generally older and therefore unable to provide for them and with limited economic opportunities for women, the boys must drop out of school to care for the family.[480] In some instances, the boys must stay away from school to take care of the family cattle which are the mainstay of their livelihood. In other instances, boys drop out of school to find jobs as herds-boys and fend for themselves and their families. This especially happens during dry seasons when pasture is scarce and the animals have to be driven long distances to find pasture and water. One children officer in Dikkir observes:

> You know during dry season like now, fathers from Chepalungu area abandon their families and go work in tea plantations in Kericho and Bomet, but they do not send home any money. Because women cannot take care of these children alone, the children end up dropping out of schools. The children, especially boys, would then be forced to drop out of school and graze other people's cattle to feed the family. The teachers then report these matters to the chiefs and the chief would summon both the man and the woman. However, because the tea plantations are far away and out of the chief's jurisdiction, he would seek our support to reach the man. Sometimes we take over such cases and follow them up.

[475] Deputy County Commissioner- Emurua Dikkir
[476] Chief-Emurua Dikkir
[477] Assistant County Commissioner- Chepalungu
[478] Deputy County Commissioner, Bomet
[479] Conversation with the Assistant Chief - Mogor.
[480] Focus group discussion with elders in Emurua Dikkir

From the above illustration, it can be observed that the high school drop-out rate is, on one hand, a product of intersecting factors but also a contributor to other factors such as early marriage and child labour which incidentally affect boys and girls differently. Although the elders and chiefs appeared alert to the various intersecting factors that result in these challenges, the fact that customary law, that they rely on, is in essence one of the intersecting factors behind these challenges often reduced their effectiveness in resolving them as an enforcement of customary law often exacerbated the challenges.

7.3 Intersectionality and 'child abuse' among the Kipsigis

7.3.1 Regional variation in child abuse and response across the Kipsigis land

Chapter one showed that the area occupied by the Kipsigis records wide climatic, economic and social disparities. Emurua Dikkir Sub-county and lower regions of Bomet County are drier pastoralist areas with higher levels of poverty and illiteracy. Bomet Highlands and Kericho County are agriculturally and economically rich and specialize in tea and dairy farming. The study observed corresponding regional variations in child abuse and responses as discussed herein.

The culture of marrying off female children, although still common in all the areas studied was mostly witnessed in Emurua Dikkir within Narok county and Chepalungu within Bomet County.[481] Part of the reason is that because Emurua Dikkir and Chepalungu sub-counties are semi-arid and therefore have low economic output, they have been neglected historically by governments. Kericho and the tea-growing parts of Bomet inherited better colonial socio-economic infrastructure such as educational facilities and have received more government attention in the post-colonial dispensation due to their economic potential. Additionally, Chepalungu and Emurua Dikkir lie at the boundary between the Maasai and the Kipsigis.[482] Since the wider Narok county in which Emurua Dikkir Sub-county lies has historically been marginalised and generally record one of the highest levels of child marriage and FGM in the country, cross-pollination of cultures between the Kipsigis of Emurua Dikkir and Chepalungu on one hand and the Maasai on the other seems to have further entrenched early marriages.

Customary structures that anchor child marriage are still very strong in Emurua Dikkir and Chepalungu compared to Kericho and the agricultural parts of Bomet. Thus children from Emurua Dikkir experience what Camilla Inda calls generational intersectionality in which children suffer due the historical marginalization and discrimination of their parents and pass the same to their own children so that a history of marginalization itself becomes a source of marginalization for the children.[483]

Within this context, female children in Chepalungu and Emurua Dikkir suffer first as marginalised Kipsigis people, secondly as children and thirdly as women. Thus, they are both subject to historical challenges facing all people in Chepalungu and Emurua Dikkir such as inaccessible health, water, general acute poverty and lack of education opportunities, to

[481] Conversation with Children officer- Emurua Dikkir and Children officer, Bomet
[482] Ibid
[483] For a discussion on generational intersectionality see Camilla Inda, 'Intersectional Discrimination Against Children: Discrimination Against Romani Children and Anti-discrimination Measures to Address Child Trafficking, (UNICEF Working Paper, June 2009) 13 accessed from https://www.unicef-irc.org/publications/pdf/iwp_2009_11.pdf

women-specific challenges such as FGM, patriarchy, unequal voices in the family and domestic violence, to child-specific challenges such as corporal punishment and child marriage as well as to girl specific challenges such as teenage pregnancy. These intersecting challenges all work together to worsen the scope and dimensions of abuse of the Kipsigis girl in Emurua Dikkir and Chepalungu relative to the girls in Bomet and Kericho.

This research revealed that neither customary law (through IJS) nor state law can efficiently address the intersecting challenges facing the Emurua Dikkir girls. Customary law is not only one of the intersecting factor behind the challenges but also embraces an interpersonal, family, clan or community-based approach to dispute resolution while completely ignoring factors that emerge from the inefficiency of the state such as educational marginalization of the entire region. State law, although able to deal with discrete children matters such as defilement of children by adults is not only physically and ideologically out of reach for most children but is also ill-equipped to address relational matters such as the multiple needs of child mothers and their babies. It was thus felt among children officers and VCOs that to some extent informal justice systems especially those based at the family level, may be better avenues for addressing the care needs of teenage mothers and their babies than courts or children officers, first because orders given by these FJS institutions would be openly disregarded with regards to the teenage mother, secondly because their issues are unlikely to reach FJS anyway and lastly because state law, upon which such orders are based, is largely inconsistent with the ways of life of the Kipsigis. [484] However, the need for community awareness of the plight and needs of such girls was considered as a prerequisite to the use of IJS in the resolution of their matters.[485]

The manifestation of customary law differs across the Kipsigis regions based on the extent of 'infiltration' by forces of modernization such as state law so that the power that customary law has over an individual differs depending on his geographic location. Those who benefit from protection guaranteed by customary structures tend to gain more in systems that are more conservative such as the Emurua Dikkir *Kokwet* systems while at the same time losing more from the detrimental aspects of customary law. On the other hand, children from Kericho and Bomet Highlands are comparatively lesser protected by customary systems such as *Kokwet* and have to rely more on the Children Officers and the chiefs.

Kipsigis children, therefore, become both victims and beneficiaries of the tussle between forces of modernization (represented by the state) and the forces of tradition represented by communities and elders. Thus children have to accept the education provided by the state (as a matter of law and practice) while also sticking to some element of customs such as communalism, respect for the elders, general acceptance of corporal punishment at home and customary inheritance claims. However, the children in Emurua Dikkir also have to navigate economic obstacles such as extreme poverty and a history of marginalization which jointly militate against access to education. The tussle between customs and the state pulls children in the opposite direction so that the stronger the customs, the stronger the pull in opposite direction. Since the strength of customs depends on the regional location of the child, children in lower parts of Bomet and Emurua Dikkir experience the greatest tussle between state and customs.

The state through its agents such as Children and Education Officers is committed to pulling the children from 'customs and tradition' into what it considers as modernization-characterised

[484] Conversation with VCOs in Bomet and Children Officers in Kilgoris and Sotik
[485] Ibid

by formal education and a statutory conception of rights and well-being. Communities, under the influence of customary law, attempts to re-assert its claim on the children by pulling them from the state institutions into customary structures and practices such as FGM and early marriage. Since neither of the two forces has overwhelming power over the other, children often find themselves in situations in which they have to constantly navigate between state and customary expectation as a complete disregard of the other often puts the child at a disadvantage and sometimes, in conflict with either the teachers, the child protection agencies or the community.

It was observed that the region in which a case existed determined the nature of the solution preferred by elders. Thus, in Emurua Dikkir and Chepalungu, IJS, especially elders, generally considered strict adherence to customary law while in the agricultural parts of Bomet and Kericho counties, the decisions were much more laced with traces of 'modernity' and even state law. Thus whereas what was considered as customary law in Emurua Dikkir was a set of traditions and customs, in Kericho and agricultural parts of Bomet the decision was generally considered as being customary simply because it was made by *Kokwet* elders and chiefs and not necessarily because it reflected any given custom. In many instances, the chiefs in Kericho and Bomet either pronounced state law on a given position or passed judgment that was based in Christianity or general morality.[486] Thus, over the same dispute, there could be different outcomes depending on the region, bringing into fore the high level of contestation over the nature and form of customary law that has dominated customary law scholarship and practice over time.[487] The following section explores this contest by looking at the intersectional foundation of child-related offences and the response of informal justice systems to these offences.

Having discussed the intersectional nature of child abuse and the different ways through which informal justice systems respond to these intersecting challenges, the following section applies intersectionality to analyse specific forms of 'child abuse' and the responses by the informal justice systems.

7.3.2 Intersectionality and child marriage

7.3.2.1 Teenage pregnancy, child marriage and child brides

Some challenges facing children such as FGM exclusively affect female children while others like child marriage affect both boys and girls although differently. However, the circumstances under which the boys enter child marriage are different from that of the girls.[488] For instance, girls who become pregnant are often compelled (either by circumstance or parents) to marry the man (often a much older man) while boys who opt for early marriage often do it voluntarily and would most likely marry another child (who would equally be consenting).[489] As discussed earlier, Kipsigis customary law thus determines the 'marriageability' of a boy or a girl based on evolving capacity and not age.

Contrary to the girls, boys who fathered children before age 18 still retain their childhood and are highly protected by the families. In fact, even when they are brought before the chief they

[486] Participant observation
[487] For such a discussion see, 'David Ngira, 'Re-examining Burial Disputes in Kenyan Courts through the Lenses of Legal Pluralism' (2018) 8 (7) Oñati Socio-Legal Series available at SSRN: https://ssrn.com/abstract=3165522
[488] Conversation with chiefs in Chepalungu- Bomet
[489] I'm alert to the legal argument that children cannot consent. However among the Kipsigis, the concept of consent is much more nuanced and is not tied to age but to evolving capacity of children.

are rarely condemned or punished. Instead, the focus is always on how to take care of the baby. To cover up for their son's actions and save them from the embarrassing eventuality of the boy being unable to provide for the baby, parents are often willing to accept the baby from the girl and her parents. In other instances, the parents volunteer to provide economic support to the girl and her parents as part of their support towards the son. Thus, the boy's identity and moral standing in society is rarely affected by his status as a father. One chief in Bomet explains:

> You will find a boy who is 17 years married to a girl of the same age or lower. This especially happens to children who drop out of primary school or who due to poverty are unable to proceed to secondary school. Sometimes the boy and girl would be in a mixed secondary school. The girl would get pregnant and the two of them can just decide to get married either immediately or after finishing secondary school. You notice that when they proceed and get married, they quarrel all the time. Many times they will have children but will be unable to provide for them, so their cases will always be here. Sometimes we even ask them to stay with their parents a little bit more to mature up.

Asked about his opinion on child marriage, the chief noted that by the time the cases come to them, the children already have babies. He further opined that because it is practically impossible to keep asking the ages of everybody who marries and due to the fact that such marriages are often organised within the two families, they cannot really know when exactly they happen and in most cases, only realize when dowry has already been paid. Other than the additional problem of distance which is aggravated by the vastness of their jurisdictions, girls who have been removed from such marriages by the chief often elope back into them thus compromising the chief's rescue efforts.[490] According to the chiefs interviewed, eloping after the first rescue is fuelled by two factors: First, girls who elope into marriage and are brought back into school face a degree of stigma from the other children in school as well as other parents who see them as a bad influence to their school-going children: Secondly most of the girls come back pregnant and due to the stigma of having a child outside wedlock, opt to go back to their 'husbands'.[491]

Boys who enter child marriage are often compelled to embrace adult responsibilities and thus work to feed their families in line with customary expectations on men. Accordingly, such boys often end up working in quarries or in other similar roles that further compromise their childhood. A Volunteer Children Officer (VCO) in Bomet observes:

> You know, sometimes children work in these quarries to raise school fees so even if you ask them to leave, they just return there. In some cases, their parents even ask them to work there and get money to buy food. Sometimes the children themselves are married and have other children so they have to work in the quarry or tea farms and feed their children. However, we are trying our best to eradicate this.

As noted above, teenage pregnancy is directly linked to early marriage which generates several additional problems for the girl. On one hand, she has less agency in the marriage and is

[490] Ibid
[491] Interview with chiefs in Bomet

therefore likely to suffer gender violence from the man and his relatives.[492] Secondly, because the number of cattle paid as bride price directly corresponds to the value and status of the girl, girls who get married off while already pregnant (or with a child) generally fetch lesser bride price which then makes it likely that they will suffer violence because the man considers his loss (that is if the girl returns to her parents) to be relatively less. At the same time, such a return is unlikely in such scenarios because the parents and clan would be unwilling to welcome her back. Accordingly, a teenage mother, throughout her lifetime is considered as a 'bad girl' who must be disposed of and never welcomed back – a reality which then exposes her to a more abusive marriage relative to a girl who got married without a child.

Thirdly, because marriage under Kipsigis customs is considered as a union between two families and by extension two clans, a girl would be unwilling to terminate this relationship single-handedly. First, because she may not be able to support her child outside the marriage and secondly because she would be unwilling to disappoint her clan and family having disappointed them before through teenage pregnancy.[493] Girls who got all their children within the family have a slight advantage when their marriages become dysfunctional because the husband's family would generally be friendly to the children and would be willing to accommodate them if she opts to leave.[494] Since her bride price would have been higher, they would consider it inappropriate to have her leave as this would be considered as a loss.[495]

Children born by the woman before the marriage would be subjected to considerably more stigma if their mother leaves them behind during separation or divorce.[496] Accordingly, such women are therefore unlikely to claim their rights against abusive partners. Even when they pursue the matter through informal justice processes, they are usually more concerned about their immediate physical safety (and the physical safety of their children) and a long term resolution of the dispute rather than an exit strategy from the marriage.[497]

In many instances, child protection agencies such as VCOs, chiefs and children officers often receive information over cases of child marriage from volunteers in the community. However, because teenage mothers are considered as adults, there is often less likelihood that anybody will report their matters. In fact, in the words of one Bomet assistant chief interviewed in the study, chiefs only learn about child marriage when the marriage becomes dysfunctional (and one party reports to him) because 'they cannot go asking anybody who wants to get married about her age nor do people walk with their ages written on their foreheads.' According to him the decision to intervene may as well be based on the physical characteristics of the girl, or on some other attributes such as whether the girl is a schoolgirl, or whether she has a child.

The chief's assertion stems from the fact that Kipsigis customs do not require the presence of the chief or village headman during marriage.[498] Instead, marriage is a clan or community matter presided over by selectively invited elders. Families that are out to marry off their girls would therefore only invite elders who are likely to comply with that aspiration and process. It

[492]For comparative findings see Inne Nandi, 'Early Marriage: Gender–Based Violence and Violation of Women's Human Rights in Nigeria' (2014) 7 (3) Journal of Politics and Law 35 accessed from http://www.ccsenet.org/journal/index.php/jpl/article/viewFile/39771/22058
[493] Interview with a victim of child marriage in Kipkelion- Kericho
[494] Focus group discussion with elders in Emurua Dikkir
[495] Ibid
[496] Discussion with Children Officer-Sotik
[497] Field observation in Bomet and Emurua Dikkir
[498] Focus group discussion with chiefs and elders in Bomet

is, however, noteworthy that the state has since passed marriage regulations that require the registration of customary marriages in line with the Marriage Act, 2014. The implication of this on customary marriages is yet to be felt. However, not much may be realised because the chief and village headmen are excluded from the registration process. Instead, responsibility is given to marriage clerks and registrars who are government technocrats and therefore alienated from the community customary structures. Customary child marriages among the Kipsigis thus continue despite the operationalization these marriages as communities continue to ignore the regulations.[499]

As noted earlier, addressing the question of girl-child marriage is problematic, first due to the inconsistency between state and customary understanding of childhood, secondly due to the customary focus on family protection and thirdly due to the difficulty in determining the age of marriage partners within the context of customary law. Part of the problem is that the age of a child in rural Kenya can only be determined through a school leaving certificate, a birth certificate or a baptism card.[500] However, there is no customary requirement to produce these documents during customary marriage processes.[501] At the same time, many children are born at home through traditional midwives and therefore lack birth certificates.

Due to the above realities, child marriage is often detected by the chief many years after it has occurred, and in most instances, after the victim has attained adulthood.

> In one of the cases witnessed in Bomet during the course of the fieldwork, a man was accused before the chief of abandoning his wife (Miriam) and children and moving to Kericho to work in the tea plantations. However, upon further inquiry, it was established that the first-born child was 10 years while the wife was 26. Since the child was born within the marriage, it can be concluded that as at the time of marriage, the mother was a child. However, the chief focused on the immediate matter (child maintenance) and ignored the question of child marriage. Asked why he did not explore the question of Miriam's child marriage, the chief noted that it was a historical issue that he could not revisit because he did not want to antagonize the family further.

Two issues emerge from this case. Firstly, marriage was determined on the basis of evolving capacity of the child and to this end, some children are considered to possess the capability to be married (for female children) or right to marry (for male children). Secondly, from the perspective of state law, Miriam's husband committed the offence of defilement and child marriage which could (and can) still be prosecuted under the Sexual Offences Act, 2006 and the Children Act, 2001. However, since this is neither a legal problem for the chief, Miriam and the husband nor for the clan, there is no possibility that formal justice processes will intervene. The focus on family unity seems to cushion this and other similar matters from robust legal intervention both at the customary and statutory level.

This scenario explains the intersectional nature of women's and girls' lives among the Kipsigis: On one hand, they experience injustice from customs but on the other, they actively pursue justice for themselves (and for their children) through structures established by the same customs. Similarly, the case raises the critical matter of the limitation of universalised notion of justice for women. Thus, whereas international instruments such CEDAW and UCRC would

[499] Conversation with Children officer, Kilgoris
[500] Conversation with volunteer children officer, Kipkelion-Kericho county
[501] Ibid

consider Miriam to be a victim of injustice and therefore entitled to a relief from the IJS or FJS, Miriam considers herself to be an agent of justice for her children.

The plight of the girl child among the Kipsigis is further aggravated by the prevalence of defilement between teenagers. It is important to remember that although the Sexual Offences Act considers sex with a child to be an act of defilement, such a conception is non-existent among the Kipsigis if the sexual activity is consensual.[502] In cases where there is no consent, defilement is considered under customary law in the same context as rape under state law and therefore punished on that basis. Although there is generally a high level of defilement for both boys and girls, girls suffer more stigma compared to boys due to the physical reality of teenage pregnancy.[503] Thus, even in cases where teenage pregnancy is a product of defilement between two children, the boy is often free from any reprisal or stigma concerning the pregnancy. The girl not only faces stigma but is also subjected to a set of radical reactions such as being married off or transferred to live with her grandmother.[504]

Child marriage is sometimes used as a means of escaping state prosecution by child defilers. Whenever men are accused of defiling a child and faces the reality of prosecution, they often opt to marry the girl before the chief can realize. Since families often welcome such arrangements due to their possibility of bringing in wealth and mitigating the shame that comes with teenage pregnancy, they easily accept the money. However, in other instances, the families do not comply with customary law requirements resulting in an order by the chief for bride price to be paid when the marriage develops problems. A chief in Emurua Dikkir observes:

> When men are arraigned before elders for making girls pregnant, they often give the 3000 shillings to the family and promise to marry them. But sometimes they neither want to marry them nor do they even love them. All they want is to escape punishment. However, after let us say five years, they chase them away and marry other women. By this time the girl is an adult so not much can be done. At the same time, she has an additional two or three children. A lot of them, therefore, end up suffering and even decide to get married to older women or just turn to prostitution.

It was however observed that many such men do not proceed to pay bride price. Since the 3000 Kenya shillings (30 Euros) is not a symbol of marriage, the men wait until the girl is over 18 then either abandon them and marry other women or simply marry a second woman. By this time, they often know that they cannot be prosecuted under state law.

The payment of bride price often marked the end of the childhood of the girl. Since *Kokwet* elders, under customary law, cannot invalidate marriage on the basis that one of the parties is or was a child at the time of its commencement, such marriages often stay. However, if both the parties are young, then the mothers and fathers in law are expected to guide the parties through the marriage. Sometimes the entire family is expected to eat and do everything together in a bid to cement the relationships between the boy and the girl. One chief in Emurua Dikkir opines:

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[502] The Sexual Offences Act is silent on consensual sexual relations between two minors but considers that between a minor and an adult as defilement, regardless of consent. For details see s 8 of the Sexual Offences Act, 2006.
[503] Conversation with VCOs in Emurua Dikkir
[504] Conversation with *Ololmasani* Elders in Emurua Dikkir

> When the cases of child marriage come to us, the children already have children, what do you do? From my experience, if try to resolve these cases of child pregnancy here, it does not work because the following week the families will pay bride price and the two will become husband and wife. So, it becomes difficult. You have to report the man to the police. The only challenge occurs of both the girl and the boy are school children.

Having discussed responses to the intersectional manifestation of child marriage and teenage pregnancy, the following section explores how child marriage is fuelled by the demand for bride price and how the demand for bride price itself is fuelled by child marriage.

7.3.2.2 The mutually-reinforcing nature of child marriage and bridewealth

We have seen that among the Kipsigis in Emurua Dikkir and Chepalungu, child marriage is fuelled by the high number of cattle that are required as bride price during customary marriages. An elder in Emurua Dikkir noted:

> You know in this area, bride price is very high. Sometimes you have to push the girl to get married so that you can get cattle that you will give to the boy to pay bride price for his wife. If you do not give him cattle he will steal the cattle from the Maasai community and maybe even get killed in the process.

Receiving cattle for bride price payment from a father is a 'right' that is enforceable under Kipsigis customary law, especially if the father has lots of cattle. However, for poor families (or families that are rendered poor after their cattle have been stolen), this right is often forgone by the boys who often opt to steal cattle to pay as bride price. To forestall this possibility, parents sometimes marry off their daughter to be able to acquire cattle for the boys. This reality best explains how male privileges help perpetuate early marriages and the oppression of female children. On one hand, boys and girls are all children and therefore collectively subject to some human rights violation-such as the lack of agency, opinion and self-determination – but on the other, the elevated status of boys upon attaining 'marriage age' becomes a foundation for further oppression of the girls, so that the rights of girls and boys develop inversely over their ages until the girls rights in her family almost gets extinguished upon her marriage.[505] This reality best explains the intersectional nature of child abuse among the Kipsigis.

The intricacies around marriage and intersectionality are perhaps best highlighted by the reality in polygamous unions. As highlighted above, girls are usually seen as a potential source of wealth to the family. Accordingly, parents often demonstrate the value and beauty of their girls by demanding high bride price. However, according to customs, the bride price given for a particular girl belongs to the mother of the girl and her sons. Thus, in polygamous families, women are presumed to own cattle depending on the number of girls they have. This has been seen to pose a challenge to the family because, under customary law, the man cannot sell the cows given as bride price without the consent of the mother of the girl. However, sometimes, the financial needs or customary obligations of the father may cut across the family. For instance, the man may be in need of money to pay school fees for the children of the last wife or in need of cattle to give the sons of the last wife to pay as bride price. This may require him

[505] Cases of child marriage involving boys were also witnessed but were generally few, both in interview conversations as well as in actual disputes witnessed. However the same will be discussed in a subsequent chapter.

to sell the cattle that were brought as bride price for the daughters of the second or first wife or marry off the daughters of the first wife over the same. Such an issue often brings conflict resulting in the intervention of the elders. Since all the wives are aware of such an eventuality, peaceful coexistence is usually encouraged to promote a symbiotic relationship between the wives and the children in the family.

7.3.3 Intersectionality, childhood and domestic gender-based violence

The study noted that domestic gender-based violence (GBV) directed at women tended to involve their children too with the girls generally being more affected than the boys. Thus whenever a girl was found to be in violation of customary law (or state law) and sent to the IJS or FJS, the blame often went to the mother for not properly bringing her up. Sometimes this blame involved gender-based violence by the husband against both the girl and the mother.[506] Within this context girls and women generally, suffer self-reinforcing violence by the men. In other instance, violence that is directed at the women would equally target the children especially if the children were not the biological children of the man, or when the trigger of the violence such as demand for money to buy food or pay school fees was linked to the children. Although such cases are reported to elders and chiefs, these institutions are often unwilling to take serious action against the man. Asked why he is generally lenient to men who assault their wives, one elder from Emurua Dikkir opines*:*

> You know like one slap is not that bad. Also, when you refer all these matters to the police and police prosecute the man, the family will break because he would not want to live with the same woman once he is from prison. Even the woman will come around and say 'you are the one who led to the imprisonment of my husband 'and you will really feel bad, so we do not like the court.

In a similar context, a chief in Emurua Dikkir notes:

> [A]nd also when the man goes to prison who will feed the children? The children will also suffer from lack of food and education and the entire clan will blame you. That is why I'm saying, if the woman is beaten a little and she is not feeling a lot of pain you just reconcile them and warn the man, there is no point of referring to the police because eventually, it is you who will be blamed.

Thus, although the prevalence of gender-based violence is not in doubt, the tolerance of the same is anchored upon customary requirement that family should not be broken and that it should be held intact for the benefits of the children who are likely to suffer if legal action is taken, especially if the same results into disintegration of the family. Accordingly, the laxity of the informal justice systems which handle most cases of gender violence has been cited as the key contributor to gender-based violence.[507] Although children officers generally see gender-based violence between spouses as being inconsistent with the well-being of the children, most of them lamented that they do not have jurisdiction over.[508] It was also noted that family clan members and IJS were generally more willing to intervene in violence cases if and when the same affected children than when the woman was the sole victim of the violence.[509]

[506] Interview with the Programme Officer, Gender Violence recovery Centre.
[507] Interview with Programme Officer, FEMNET
[508] Conversation with children officers in Kericho, Bomet and Sotik
[509] Focus group discussion in Abossi, Emurua Dikkir

Notwithstanding the fact that elders and chiefs were quite tolerant to GBV except when it was life-threatening, many girls and women still sought help from the chiefs and elders.[510] It was however observed that the VCOs, although comparatively more hostile to gender-based violence did not receive many cases of this nature as they only intervened if the violence affected children such as in cases where the dispute had resulted into separation and abandonment of children by the mother/father or in cases where the violence had targeted both the mother and the children. Because of the holistic consideration of women and children as belonging together under customary law, men generally felt that they had the power and right to mete violence on both the children and their mother. Accordingly, gender-based violence was seen as an element of Kipsigis customary law.

As noted earlier, the lack of assertiveness among child brides as well their inability to seek social support at the onset of violence often means that many of them suffer in silence and only report aggravated cases of violence. However, their young age often means that they are inexperienced in 'home management' a situation which attracts ridicule from the in-laws and co-wives and gender-based violence by the husband.[511] Such violence even when reported to the IJS is often seen as justified.[512] Accordingly, the IJS would not focus on reprimanding or punishing the man but on 'educating' the child bride on how to take care of the home, the husband and the overall family to avoid future violence. This is usually done by assigning an older woman, usually the mother in law, or another close female relative, the responsibility of mentoring the girl.

This normalization of violence by IJS has led to double jeopardy in child marriages and further entrenched the insubordination of women in general and child brides in particular. The fact that many child brides often have children at the point of marriage coupled with their lack of power, voice, economic capabilities and fear of embarrassing their families often means that child brides can neither report cases of violence to the police nor exit the abusive marriages. Accordingly, child marriage and gender-based violence are considered to be self-reinforcing.

7.3.4 Understanding child labour among the Kipsigis from an intersectional perspective

An-Na'im argues that an understanding of child labour must first start with an appreciation of the various ways in which children are socialised.[513] Accordingly, he points out that some actions that constitute child labour in international human rights law are essentially mechanism through which non-western societies socialize children and cultivate work ethics among the young generation.[514]

An-Na'im's argument is very helpful in understanding child labour among the Kipsigis. What has been classified as child labour in law is inconsistent with local realities of the Kipsigis where child labour is not only a form of socialization into work ethics, but also an element of child survival and fulfillment of certain rights and elements of well-being, such as the right to

[510] Conversation with GVRC and CREAW, Bomet
[511] Interview with child bride in Mogor, Bomet
[512] Conversation with elders in Ololmasani
[513] An-Na'im (n 357)
[514] Ibid

food and general livelihood. Thus a blanket ban on child labour may actually violate the child's well-being and best interest(s).

Although tea picking is occasionally undertaken by both men and women, it is largely considered as a job for women and girls.[515] In Bomet and Kericho, girls miss school to join their mothers in picking tea for their wealthier neighbours while on the other hand grazing cattle is considered men's job-and, therefore, boys are likely to miss school and engage in grazing.[516] In Emurua Dikkir where cattle keeping is predominant, male children were likely to drop out of school and become employed as herds' boys.[517] Although goats, donkeys and sheep are considered as 'women's animals,' it was not uncommon to find children (both boys and girls) either using donkeys to fetch water or grazing goats and sheep.[518] However, because this is only done in the domestic sphere, girls are less likely to be employed as shepherds (and are therefore less likely to drop out of school over the same).

The consideration of all children as requiring emancipation from child abuse without considering the extent to which gender and cultural factors differently affect male and female children, therefore, compromises any substantive development in the content of children rights. John's case best explains this reality.

> John dropped out of school at form two (10th grade) at age 15 due to financial challenges and became a motorcyclist.[519] However, because he would never give any money to his parents, his relationship with them deteriorated. John then met a girl that he wanted to marry but the father refused to give him land, noting that he was too young to marry or possess land. A conflict ensued and John threatened to beat up his parents if they did not grant him his share of the land. The parents consequently reported the matter to the *Kokwet* elders who convened a session to resolve the matter. During the session, the elders reprimanded John and ordered him to apologise to his parents. They also informed him about the dangers of parental curses and warned him that if he continues disrespecting parents, they would not only curse him but also report his case to the chief. The parents were also informed that they could not deny John the right to marry and the land as he was of marriage capacity. Accordingly, the parents were asked to help John undertake the necessary marriage requirements so that he could proceed with his marriage. The elders also noted that since the boy was circumcised and was able to ride a motorcycle and generate money, he was able to take care of a family.

According to the *Kokwet* elders, parents hold ancestral land in trust for future generations and thus a boy is customarily entitled to a portion of his father's land. Parents are also under an obligation to help their male children to marry by facilitating the payment of bride price. Although the parent can refuse the marriage on account of the personality, clan or family background of the girl, they cannot do so on the basis of the boy's character.[520] The fact that the boy is able to work and generate money, therefore, works to justify his marriage and perhaps explains the intersectional nature of child labour and the extent to which forms of child abuse reinforce and perpetuate each other.

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[515] Interview with Children officer-Kericho
[516] Interview with children officers in Kericho and Bomet
[517] Interview with children officer –Emurua Dikkir
[518] Focus group discussion, Emurua Dikkir
[519] Case witnessed in Bomet County
[520] Conversation with Elders in Bomet

As observed earlier, childhood confers obligations and rights which are unique for boys and girls. Within this context, the girl is assumed to be an adult and is expected to work and feed her child, a reality that in many instances pushes her into child labour. One Volunteer Children Officer in Emurua Dikkir opines:

> In this area, we have a big challenge with teenage pregnancy. You know these girls are easily cheated by the boys. And the boys easily get money by riding motorcycles. So a boy would either drop out of school completely or go to school from Monday to Friday and ride motorcycles on Saturday and Sunday. He would have a lot of money to spend on the girls here. However, when the girl gets pregnant, she gets into trouble because now she is expected to work and take care of her child. She is therefore pushed into working in the tea farms as a tea picker, vendor or transporter.

Asked whether that was the case with the boys too, she observes that:

> The boys do not buy the motorcycles. There are rich people who buy several motorcycles and rent them out at a fee of 200 or 300 shillings per day.[521] These people cannot rent out these motorcycles to girls because nobody will accept being carried by a girl on a motorcycle, and so they will not pay the 300 shillings fee. Parents also cannot allow their girls to ride motorcycles because they will be 'spoilt'.

As highlighted by An-Na'im, child labour is very contextual and may be necessary in attaining the child's well-being.[522] Thus although riding a motorcycle for pay would amount to child labour under international law, IJS among the Kipsigis do not consider it as being wholly inconsistent with child well-being because motorcycle riding is sometimes done during weekends when children are out of school (and therefore does not interfere with the child's personal or educational development).[523] Since poverty in general and child poverty, in particular, is quite rampant in Emurua Dikkir, riding motorcycles is one way through which boys escape poverty as it enables them to generate money both for themselves and for their families.

Child poverty affects boys and girls differently. By allowing the boys to engage in the transport business while restricting the girls, the Kipsigis custom seems to play an active role in entrenching the poverty and vulnerability of the girl child compared to the boys. Accordingly, the boy child has more economic opportunities compared to the girl. But this is not necessarily straightforward. The study noted that the motorcycle industry is partly responsible for the increasing school drop-out rate among the boys. A chief in Bomet laments:

> Many parents are now coming to us over cases where children drop out of school and become motorcyclists. They want us to have the owners of the motorcycles prosecuted and their children to forced back to school. But you see, this is very complex. Sometimes the owner gives the motorcycle to an adult who in turn gives it to a child. And you see nobody gives riding licenses to these motorcyclists and

[521] This amounts to about 1.8 or 2.7 Euros a day respectively
[522] An-Na'im (n 357)77
[523] Conversation with VCO in Emurua Dikkir.

> nobody asks about the age of the motorcyclists before boarding so it is usually very difficult for us to stop it.[524]

According to many children officers and chiefs interviewed, child motorcycling is one way through which many poor families can generate income. Accordingly, there are many families that rely on the boys to ride motorcycles and bring home money. Within this context freedom from labour and right to education remain secondary concerns to the immediate concern of food. However, the freedom to generate money that is granted to the boy child interacts with poverty to militate against the well-being of the girls as they easily become victims of sexual exploitation by the 'richer' boys.

Although human rights instruments would consider motorcycle riding to be a form of child labour, the informal justice systems (IJS) often consider it as a means of overcoming poverty and a form of masculine engagement for the boys. This is because childhood and child labour among the Kipsigis is determined based on physical and mental capacity rather than on the basis of age. Even when disputes emerge concerning the use of motorcycles, such as cases where boys refuse (or fail) to remit money to the owners of the motorcycles, or damage the motorcycle and fail to repair them, the focus of the IJS is usually on having the money paid and the motorcycle surrendered or repaired rather than on examining whether the process amount to child labour and the legality of the contractual obligations under state or customary law.

According to the labour officers in Bomet, the existence of parallel justice system run by elders and chiefs who are neither cognisant of 'labour laws' nor conscious of child labour has perpetuated the increasing involvement of children in the motorcycle industry. At the same time, child motorcyclists are sometimes preferred because they can easily be manipulated into accepting lower commissions, a reality that makes any intervention by state actors like labour officers futile.

One of the reasons why people who lease out their motorcycles to children are generally reluctant to pursue cases of default in payment through the formal justice systems is due to the difficulty of enforcing a contract against a child (as the same would be considered illegal *prima facie*).[525] At the same time, any pursuit of the same would attract the attention of the authorities over the question of child labour. On the other hand, IJS are often compelled to strike a balance between the need to alleviate child poverty, the evolving capacity of the child and child labour. Thus, unlike cases of rape or theft where the chief would directly intervene even without receiving a complaint or report, there is often a reluctance to intervene in cases where children are used as motorcyclists. One chief in Bomet noted:

> You know some of these children do a lot with the money that they get from motorcycles. Some of them use the money to pay school fees while others use it to supplement their parent's meagre income. You know in this area we hardly have rain. For instance, it is almost a year since we last saw rain. All crops dried up and we have nothing to eat. Those with hardworking children like the ones who ride motorcycles are therefore lucky because they have someone who can at least bring food to the table.

Although VCOs chiefs and elders were generally tolerant to child motorcycling, especially when the same did not interfere with school days, the Children Officers, almost in unison,

[524] It is noteworthy that according to s 30 of the Traffic Act, motorcyclists require a licences to operate on the road. However in practice they rarely acquire them especially in the rural areas.
[525] Conversation with a Children's Court Magistrate in Bomet

considered child motorcycling to be a form of child labour and therefore illegal. Asked about his view on child motorcycling, one Children Officer from Kericho Opines:

> Hiring out motorcycles to children is illegal because the Children's Act does not allow children under 18 to work. We sometimes encounter such cases when we visit the community although I must admit that they are never reported to us frequently because most parents do not mind their children engaging in the business. However, when we receive them we usually warn the perpetrators and when they continue with this behaviours we report the matter to the police and have them prosecuted.

Having discussed the intersectional foundation of child labour and the different ways through which intersecting roles, responsibilities and expectations of boys and girls contribute to a violation of their well-being and how the abuse of boys and girls reinforce each other, the following section explores the nature of offences committed by and against children and the response of informal justice systems to these abuses.

7.4 Intersectional nature of child-related offences and disputes resolved by informal justice systems

7.4.1 Response to criminal offences committed by children

What is considered a criminal offence by a child under customary law is fundamentally different from the state's conception of child criminality. Whereas any offence under the Penal Code, committed by a child, subject to the age of criminal responsibility, *men's rea* and *actus rea*, retains the same status under state law, IJS see children as victims of poor child upbringing, cultural or socio-economic factors, and therefore do not see them as possessing the ability to commit a crime.[526] As such, offences committed by children are seen as minor forms of deviance and are resolved in an integrative approach that seeks to punish but also address the underlying cause of the violation. Accordingly, a child is only perceived as a criminal under IJS if he becomes a serial offender or commits a major offence such as aggravated assault against an adult or murder.

The study found that most children brought before the chiefs and elders for acts of deviance were boys. Girls according to customs, are expected to be 'pure and stay away from trouble', a factor which explains why they are rarely involved in deviance at least at the community level. Even when they appeared before elders, their offences were largely social in nature i.e. either being sexually involved with a man (most often motorcyclist or being very disrespectful to the mother). Most offences reported against boys involved stealing either at home or from neighbours and causing bodily harm to other children.

The purist expectation on girls under IJS worked against the few girls who ended up before the formal or informal justice systems as their very appearance before the elders or chiefs generated stigma against them as parents generally advised their children to stay away from 'the bad girl who had been arraigned before the chief.'[527] In the eyes of the community, the question of whether the girl had been found innocent of the accusation, or whether she had been spared of

[526] According to s 14 of the Penal Code, the age of criminal responsibility for children in Kenya is 8 years.
[527] Interview with a girl who had been arraigned at the Chief's Office in Mogor for refusing to go to school.

punishment by the IJS was an irrelevant one. The mere fact that a girl had been arraigned before the chief or elders was considered to be offensive to culture and morality and therefore frowned upon.[528] Accordingly, girls often found the VCOs to be generally more receptive to their concerns, first because they were seen to be generally flexible, approachable, 'understanding' and responsive to girls' specific challenges such as teenage pregnancy but also because a considerable number of them were women.[529]

The worst form of stigma faces female children who are presented to court upon the exhaustion of informal justice options. Upon serving their terms in the child rehabilitation centres or borstal institutions, such girls return to the community. As a practice, the Department of Probation Services usually hands child returnees to chiefs and elders who are then expected to facilitate their re-integration into the community. However, the stigma around such girls is sometimes so aggravated that it renders their re-integration virtually impossible. This is because both the chiefs, elders and community are generally resistant to the re-integration of such girls on the assumption that their incarceration at the rehabilitation institutions has possibly worsened their deviant character. The Bomet Probation Officer narrates:

> There is a girl who was arrested and sent to a rehabilitation school for stealing 2000 Kenya shillings[530] from her sister with whom she was staying, having lost both parents. She came back after 3 years. We tried to reintegrate her into the community but her sister refused to accept her back. Also because girls are not expected to steal, the family elders, chief and relatives were not so forceful in pushing for her case. We were then forced to hold her for an additional year as she had nowhere to go but because we could not hold her any longer, we decided to help her establish a salon. You know in the rehabilitation schools, they are taught various skills so she was taught hairdressing. Right now she has her salon and she is doing very well. Luckily her grandmother has now decided to host her. So she runs her salon and goes back to sleep in the grandmother's house.

This case raises the question of whether the best interest of the girl, and by extension of the woman lies within the customarily prescribed family framework or within the wider capitalist market economy with its focus on economic empowerment of women. As noted above the probation office had to situate the girl within the broader capitalist economy as a way of curing her rejection by the community. In the eyes of the community, the girl was unwelcome back not only because she had engaged in stealing but also because her interaction with the formal rehabilitation schools was considered to have 'spoilt' her.[531] Accordingly, she was seen as a potential negative influence on other children. It can therefore be argued that exiting cultural structures (either by physically relocating to towns and cities as noted in chapter five, or by 'gaining independence' and joining the capitalist economy) may be a way out for women and girls who are perceived to have violated customary law and moralities especially in cases where no cleansing ceremonies or remedies are prescribed by culture such as in the above scenario. In other words, the girl's rejection in the above scenario is partly attributed to lack of a customary re-integration mechanism which would allow for her re-acceptance, such as cleansing, making her ostracism a permanent fact. Essentially an escape from culture seems to be her only way out. Asked whether they had dealt with a case of boys rejection, the Probation

[528] Reflections from multiple interviews with girls and elders.
[529] Conversation with girls and VCOs
[530] Roughly 20 Euros
[531] Ibid

Officer was emphatic that boys are never rejected first because they are often tied to their ancestral land, secondly because they are seen as integral to the clan's well-being and thirdly because boys are seen as generally deviant and 'tough' so that an interaction with the formal child rehabilitation institutions is perceived as a normal reality. Similarly, the moral yardstick for measuring the actions (or inactions) of the boys is generally lower than that of the girls, a fact which allows them to easily get away with more mischief than the girls without attracting severe negative sanctions from the Kipsigis community.

Since the stigma on girls is comparatively less when the girl's cases are handled by IJS compared to when they are handled in formal justice processes, (although still more than that of the boys under IJS) formal child protection agencies such as children officers, police and courts prefer informal justice systems which are more re-integrative and restorative in approach.[532] Parents and child protection agencies, therefore, have to strike a complex balance between opting for corporal punishment under IJS as discussed in chapter five, or going for formal justice systems and being subject to post-incarceration stigma and rejection by the community as highlighted by the probation officer above. Reliance on the *Kokwet* elders is generally seen to be more integrative because in most instances, family and clan elders opt to have the matter resolved at the home of the child's parents, therefore reducing the possibility of other community members knowing about the child's deviant behaviour and thus saving him or her from community stigma.[533] This approach is generally more productive than the more instrumental chief's approach which requires the case to be heard at the chief's office where the presence of many community members often exposes the child to ridicule, stigma and isolation, or the formal justice systems' approach which requires the child to be physically present in court and eventually to rehabilitation schools or borstal facilities.

It was observed, as stated earlier, that there is a tussle between the state agents such as children officers and IJS over the processing of children in conflict with the (state) law. Part of the reason is that children engage in actions that violate both state law and customary law. However, because customary structures consider the underlying social, economic and structural foundations of juvenile delinquency, they are generally more holistic in addressing the matters. For instance, a matter concerning a child stealing for food is not only resolved by punishing the child but also by exploring different initiatives of ensuring that this does occur again. One strategy employed by the chief is to include the child's parents among the beneficiaries of relief food or other government and NGO subsidies. In cases where the child lives with the grandparents especially if the parents are dead, the IJS often enrols the grandparent in the old people cash transfer programme. It is therefore believed under IJS that getting money to the grandparent would cumulatively result in a better livelihood for the child and therefore abstinence from theft. Secondly, communities consider formal justice systems to be too radical and therefore unsuitable for the child who is largely seen as mentally underdeveloped. Accordingly, there is often a reluctance to report children to formal child justice agencies such as the police. The following section explores this reality further by examining the nature of offences committed against children.

[532] Conversation with probation officers in Bomet, Children's Court Magistrate-Sotik and police officers in Kericho

[533] Assorted interviews with elders and VCOs in Bomet

7.4.2 IJS response to offences committed against children

Offences against children were either perpetrated by adults or other children. Cases of child violation of another child were generally unlikely to reach both informal and formal justice systems as they were often resolved between the parents of the children or in the school context, by the teachers.[534] However, in some instances, the injuries sustained warranted expensive medical intervention in which case the parents of the injured child would demand payment of the medical bills by the parent of the offending child.[535] In case of disagreements over the nature or amount of payment, such matters often went to the informal justice systems with the main parties being the two sets of parents and not the children. Due to the unpopularity of formal justice systems, the cases were basically exhausted at the IJS level.

The second type of cases involved adult perpetrators. These include defilement, early marriage or FGM. It was observed that cases of adults violating children were more common against girls, although others like 'child labour' were mainly perpetrated against boys. In many instances, violations against boys were perpetrated by other boys. However, violations such as child marriage or FGM were not considered as criminal under the lower levels of IJS such as *Kokwet*, clan or family elders. Thus, family, clan and *Kokwet* elders only focused on mitigating any disagreements that may occur from these processes rather than punishing or reporting the perpetrators the police. However, it was observed that the chiefs occasionally recognised the criminal nature of these offences and thus tackled them by reporting the matters to the police and mitigating the negative implications of the practices. This was also seen to take a regional dimension with chiefs in Kericho and Bomet highlands seen to be generally receptive to state law and therefore likely to report to the police as opposed to those in Emurua Dikkir and Bomet lowlands.

FGM as a practice is characterised by the highest level of tussle between state and customary law. Whereas chiefs are generally not sanctioned for addressing civil disputes arising from children such as child custody and maintenance, they are generally interdicted from mediating in criminal matters concerning children especially those concerning FGM or child marriage.[536] This is because the state sees mediation and customary law as being inconsistent with the well -being of children. However, in many instances parties report children's matters to the chief not for onward transmission to the police as implied in state law but for conclusive resolution. Even when they mediate upon disputes arising out of FGM and child marriage, the police and ACCs are often oblivious to the chief's involvement as their decisions would be largely accepted by the parties. The failure by the community to report such chiefs is therefore cited as one of the obstacles to the state's intervention against FGM.[537]

Lastly, the understanding of child marriage among chiefs seems to be highly gendered. Child marriage is seen as the marriage of a young girl to an older man. Cases where two children marry each other, are either socially accepted in cases where the children are out of school, seen as misbehaviour that can be corrected by legitimation through bride price payment or broken

[534] Participant observation
[535] Focus group discussions in Mogogosiek, Bomet
[536] Conversation with chiefs in Kaplong, Bomet
[537] Interview with Bomet Children officer

through caning and forceful separation of the children.[538] Accordingly, the marriage of boys (male child marriage) is invisible and therefore undocumented and unaddressed.

7.4.3 Disputes between two spouses in which children are the main victims

Although state law claims jurisdiction over all children matters, including the ones that involve their parents, it was observed that generally, both the parties in the conflicts as well as the IJS are reluctant to seek state law intervention.[539] This is not only because they are considered as private matters and therefore firmly within the purview of IJS, but also because IJS and the parties often feel that the underlying dynamics of spousal disputes are inconsistent with state law.

It was observed that women who had separated from their husbands but who wanted child maintenance were the most reluctant to embrace state law.[540] Part of the reason is that state law does not guarantee land inheritance for the child and thus whereas orders can be sought over school fees and food, the same cannot easily be extended to land as inheritance matters can only be addressed after the death of the benefactor. Fearing that state law intervention would basically cut off the link between the son and his father's clan, many women with sons opted for IJS which often address all the underlying customary issues including the question of child land inheritance.[541] Although children's courts could in theory order that certain property such as the family house be reserved for the children, such an order is impossible to implement in Kipsigis land (and indeed in many parts of rural Kenya) because rural homes are generally located on ancestral land which is legally protected.[542]

Customary tenure systems often mean that the father of the children does not have an actual title in his name but would often jointly own the land with other clan members under customary arrangements.[543] The women's fear is further buttressed by the Kenyan formal legal landscape in which children cases are seen as independent from matrimonial and marriage disputes. Thus even if the women were to seek the court's intervention with regard to matrimonial property for the sake of the children, ancestral land, which is often the only tangible property owned by rural families is protected by the Act and is thus not considered to be part of the matrimonial property.[544] Accordingly, it cannot be divided at the dissolution of the marriage. In the event that the husband is not formally employed or in a contractual farming arrangement with tea companies, as is the case in most parts of the research area, both the women and the children would basically end up with nothing under the formal justice system. This is because courts cannot make monthly or annual orders on grains and cattle which are the primary means of wealth possession among the Kipsigis.[545] These realities often compel women to seek help from

[538] Interview with chiefs across the research area
[539] Participant observation
[540] Multiple interviews with IJS clients and focus group discussions
[541] Interviews with women in chief's *barazas* and *Kokwet*.
[542] S 6 as read together with s 11 of the Matrimonial Property Act, 2013 protects ancestral land from any division in case of marriage breakdown as it is excluded from matrimonial property. S 11 (b) specifically emphasises the need to recognise 'the principle of protection of rights of future generations to community and ancestral land' during the resolution of matrimonial disputes.
[543] Conversation with magistrate in Kericho
[544] See s 6,11 of Matrimonial Property Act, 2013
[545] Interview with magistrates in Sotik

informal justice systems which are much more malleable to the local property ownership realities.

At the same time, it was felt among the women interviewed, that a divorce or separation arrangement in which the woman went with sons was unsuitable because, in their view, it makes remarriage difficult as the sons are seen to pose inheritance threats to the new husband and his biological children.[546] Consequently, many women opted to leave behind their sons and go with their daughters during divorce or separation. However, this equally generated a customary problem for the women since under customary law they should go with all the children upon divorce and if necessary, return them much later to claim their inheritance or when they were old enough to be cared for by their father and paternal grandparents. Chemutai's case perhaps highlights this reality.

> Chemutai had been having problems with her husband since their marriage and eventually decided to leave the marriage. However, as at the point of leaving the marriage, Chemutai took away the female child who was older and left the male child who was 10 months old. The father reported the matter to the chief who wrote a letter summoning Chemutai to his office. After listening to both parties it was decided that Chemutai had to go with the baby pending a full hearing of the matter in which the parents of both parties would be invited. This hearing was scheduled for the following week. As a standard practice, the person who reports the case has to pay the elder's fee except in land matters where both parties have to pay and Chemutai's husband had to pay the same.

The commitment of most families to the continuity of the family is often inconsistent with the adversarial nature of state law. Accordingly, the attempt by state law to intervene in family disputes for the sake of the children is often met by resentment and in some instances even withdrawal of cases from the courts back to the IJS.[547] Part of the reason is that some parental disputes between spouses may be rooted in circumstances that fall outside the reach of state law.[548] Secondly, in the process of disputing parties may engage in acts that are considered as taboo and which require cleansing or some other traditional ceremony.[549] Accordingly, in such instances, state law is considered as unsuitable since the elevation of the child above reciprocity approaches embraced by customary law is seen as socially disruptive. Asked why he prefers using customary law in family disputes, a chief in Bomet opines:

> There are parties who marry through customary law here then leave the wife at home and while working in the city, marry another woman under the law of the government. They then proceed to have children with both women. When a dispute arises you have the question of bigamy under the law of the government and which we are expected to report to the police. But this is not under customary law and community will always wonder why you reported the matter. They will see it as vendetta…. if you ask the man to leave the first wife, the children will suffer. If you ask him to leave the second wife her children will suffer too. Since the first wife usually does not have a problem with the polygamy, you just let them stay based on customary law. It is the only way of helping those children.

[546] Interviews in Bomet
[547] Interview with the Bomet Children's Court Magistrate
[548] Ibid
[549] Ibid

7.5 Summary

This chapter has demystified the assumptions in rights talk concerning the 'one rights fits all approach' in child protection. It has illustrated how customary law contributes to the loss of childhood for boys and girls and how informal justice systems respond to these realities. Customary law creates a different set of obligations and expectation on boys and girls resulting in different outcomes on their well-being. Regional and historical variation across the Kipsigis land has a great bearing not only on the influence of informal justice systems on members in general but also on the ability of customary law to elicit compliance. Thus both the positive aspects of customary law that are protective of children's interests such as strong family connections and the negative aspects of customary law such as FGM are comparatively more pronounced in Emurua Dikkir and lower parts of Bomet than in Bomet highlands and Kericho. The intersectional understanding of childhood, child abuse and child well-being under customary law does not necessarily result in better outcomes for the children all the time. In some instances, it results in decisions that violate the very interests that it seeks to protect while in other instances it excludes certain categories of children based on their gender, age and unique situations.

The contest between state and customary law characterise the entire question of the approach to child well-being among the Kipsigis. State law presumes a clear cut dichotomy between parents and children while customary law sees them as being indivisible. In many instances, children officers find themselves with children matters that have a family and clan dimension. Since the law does not envision such cases, the available legal framework does not effectively empower them to resolve the cases thus compelling them to refer them to the informal justice systems which are much more comprehensive and contextual in addressing children matters.

The chapter has also discussed how formal and IJS overlap and complement each other in child protection. The intersectional nature of children matters thus render the one size fits all approach of state law to be inconsistent with the well-being of the child, thus compelling IJS to intervene either directly by receiving the cases or indirectly by having the cases referred to them from the FJS. It has shown that children matters are often so intertwined with those of families and parents that isolation of children from family matters is impossible. Building on these findings, the following chapter explores children's attempt to transplant rights talk to the family arena and the resistance of families and IJS to these attempts.

CHAPTER 8

Welcome in school, rejected at home: The contested 'homecoming' of children rights among the Kipsigis [550]

8.1 Introduction

Chapter five of this thesis explored the location of child well-being within the language of care and virtues under Kipsigis customary law. Chapter six proceeded from this observation to explore how the best interest of the child is understood and constructed under Kipsigis customary law and how this relates to child well-being. The previous chapter discussed how intersecting factors interact to produce outcomes that violate the best interest of girls and boys and how these realities are addressed by informal justice systems. This chapter addresses the question of the (un)suitability of rights talk for the well-being of Kipsigis children. The first section of this chapter explores the conception and manifestation of customary rights under the Kipsigis language and customs and highlights how certain principles of rights could be found in Kipsigis understanding of human obligations and entitlements. The second section explores the rejection of rights talk among Kipsigis families.

Using specific case studies, the section illustrates the rejection of the language of children rights in favour of a more virtue-oriented conception of child well-being. Similarly, it also illustrates the counterproductive effect of rights talk in guaranteeing child well-being among the Kipsigis. The third section explores children rights claims under informal justice systems and explores the reception of the language of children rights among the Kipsigis. It explores how in the face of the dominance of the language of care and ethics at home and in informal justice platforms, the language of rights is transferred from the various legal instruments to the home environment through the school textbook and children. It concludes by describing how legal rights, conveyed to the children through school textbooks, are claimed by children but resisted by parents and how informal justice systems respond to these realities. This chapter by engaging in the discussion on the interaction between rights and ordinary virtues at the community level addresses one of the key objectives of the research and demonstrates that whereas rights talk and rights instruments provide a framework within which child well-being could be understood, local conceptions of well-being play a central role in the fulfillment of this well-being. The state's attempt to infiltrate the family through child rights talk, the family's resistance against the state and the location of children between this tussle is, therefore, an overriding theme in this chapter.

8.2 Rights talk under Kipsigis customary law

The translation question that has characterised legal anthropology for decades is important for this research because it highlights the challenge that occurs when lived experiences are interpreted into different customary and normative experiences through research.[551] Translating the concept of rights from its use in the Kipsigis dialect to English and vice versa, as well as its fluid use among the Kipsigis, posed a semantic problem that is discussed below.

[550] This title is borrowed from Barbara Oomen, 'Rights for Others: the Contested Homecoming of Human Rights in the Netherlands (2011) 31 (1) Netherlands Quarterly of Human Rights 41

[551] For such a discourse see Gluckmann vs Bohannan debate (n 58)

In Kipsigis dialect, *imanda* means 'a right' while *imandanyun* means 'my right'.[552] However, this language of rights is fundamentally different from the rights in human rights instruments and discourses. An appeal to *imandanyun* does not necessarily translate into a right under any given convention, treaty or law nor does it even imply that the action is good in and of itself; rather it is an appeal to an entitlement which may even generate negative outcome when exercised against a second party (and potentially even violate his/her convention or legal right). In fact, evidence from my fieldwork indicates that even actions that violate children's convention rights are justified on the basis of *imandanyun*. For instance, when a parent subjects a child to corporal punishment, FGM or any other violation, and the issue becomes subject of dispute resolution by the elders, the parent will justify his/her action on the basis of *imandanyun* –a right to discipline the child through corporal punishment or a right to subject the child to FGM.[553] The two would correspond to parental obligations under Kipsigis customary law.

On the other hand, when a Kipsigis child appeals to *imandanyun* as a rights claim, the appeal is based upon the legal rights taught in school, essentially the rights contained in the children's Act, 2001 and by extension the UN Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). It is therefore contradictory that parents accept *imanda* that emerges from customs but completely reject *imanda* that emerges from the UNCRC and ACRWC and filters to the children (and parents) through the human rights classes offered in primary school. For instance in the case discussed below involving a child-Mildred's refusal to go to her parents' church, Mildred's mother wondered what *imanda* she was talking about because in her view, there cannot be a right *(imanda)* that allows a child to go against the orders of the parent and if such a right exists then it is a form of indiscipline that must be corrected by disciplining the child in line with the parent's *imanda* under customary law.[554]

However, land inheritance or animals for bride price payment can be claimed by male children on the basis of *imanda* as will be discussed later in this chapter. Similarly, a child may require inheritance from his living father but the right to inheritance is not conferred by any human rights instrument but by customary care ethics. An appeal to human rights, therefore, quashes any possibility that this inheritance will be granted. Universal rights would, from the outset fail to emancipate such a child forcing him to resort to customary right *(imanda)* that locates his inheritance in the customary virtues such as care. Mildred's case in Kericho illustrates this reality.

> Mildred and her parents were members of the Ministry of Repentance and Holiness (MRH), an ultra-conservative Church in Kenya.[555] However, when she joined boarding secondary school, she quit her parent's church and joined the Anglican Church which was the main sponsor of the school.[556] During school holidays Mildred refused to accompany her parents to the Ministry of Repentance and Holiness Church, arguing that she had a right to choose her church. Her parents, however, insisted that she had to accompany them to the church or

[552] Conversation with Ololmasani elders in Emurua Dikkir
[553] Participant observation in Emurua Dikkir
[554] Mildred's case is discussed below
[555] The church is led by a prophet who is believed to possess the capability to perform miracles.
[556] Early Christian missionaries that established schools in Kenya affiliated them with their churches. Thus, although the state later came to own these schools, their church affiliation remains to date.

leave the house. The parents were adamant that as a child, Mildred cannot choose her own church. Moreover, members of the MRH church had contributed money when Mildred joined secondary school thus it would be an abomination for her to abandon the church. Mildred, on the other hand, saw the church as being conservative and restrictive. She, therefore, preferred the more liberal Anglican Church. Fearing that they would beat her or physically drag her to the church, she ran away to her grandparents who tried to intervene but to no avail. The grandmother invited the clan elders to intervene but still, no solution was found. Eventually, the Volunteer Children Officer (VCO) had to come in to try and resolve the matter. The VCO pointed out that children had freedom of choice and religion but emphasised to Mildred that she was under an obligation to respect her parents. Fearing that the parents would subsequently refuse to pay her school fees, Mildred complied and re-joined her parent's church.

Rights talk in customary settings may actually delegitimize moral claims especially if the duty bearer-such as Mildred's parent, does not recognize or appreciate the content or normative foundation of the same right. In fact, evidence from this study indicates that some conventional children rights, to the extent that they are claimed within the cultural and social context in which their source is not considered as legitimate, may be inconsistent with the best interest of the child. The legal assumption that the best interest principle is founded on the language of rights, is therefore inconsistent with the lived experiences of Kipsigis children. Thus, whereas schools emphasize on convention and legal rights of children, the same is generally unrealizable unless characterised by parental and communal approval and implementation.

Another concern has to do with implementation. As noted above Mildred's freedom of religion is extinguished first by the ambiguous framing of the right under the children's Act, 2001 (that would make Children Officers unable to enforce it) and by its non-existence within customary law. This is because the children's Act, 2001 does not create freedom of religion for the child. Rather it creates 'a right to religious education subject to appropriate parental guidance.'[557] Although the VCO identified Mildred's freedom of religion as a real right, she considered it to be of lesser value compared to her parent's concern that she needs to go to their church**.**

At the grassroots level, customary law comes in to mediate between Mildred's three sets of rights. Mildred's freedom of choice, freedom of religion and right to education are all in conflict with each other as well as with the parent's customary right to guide and nurture her. In formal justice systems, doctrines such as proportionality of human rights have been traditionally relied on to resolve such conflicts of rights. However, under informal justice systems, the hierarchical conception of interests, in which the parent's customary rights and care obligations are presumed to override any other concerns raised by (or for) the child seems to be the overriding strategy in the resolution of 'rights' conflicts.

Due to social interaction between members of the Kipsigis community and their neighbours such as the Luo, Kisii and Maasai, an overlap of customs was observed during the fieldwork. Members of the Kipsigis community who live along the borders were either subject to both cultures or often spoke both languages.[558] Since geographical boundaries and the jurisdiction of chiefs do not strictly follow the ethnic identity of the inhabitants, members of neighbouring

[557] S 8
[558] Field observation

communities often found themselves under the jurisdiction of Kipsigis chiefs and VCOs.[559] Accordingly, the rights discourse across the various communities is always cross-pollinated. For instance, among members of the Maasai community who border the Kipsigis to the South, e*sipata e tungani* loosely translates into 'rights of the people'.[560] The 'people' in this context, imply members of the Maasai community and not necessarily all human beings while 'right' in this instance has more to do with a customary entitlement and not a 'human right' as indicated in human rights treaties. Accordingly, there are rights such as the 'right of a Maasai pastoralist to graze their cattle on Maasai community land.[561] A non-Maasai herds-boy, therefore, does not possess this right as he is not considered to be part of 'the people' to which the right is conferred.[562] Conversely, a claim brought to the elders by a Maasai herds-boy against his neighbours for denying him grazing rights is likely to succeed on the basis of *esipata e tungani* while a similar case by a non-Maasai local herds-boys brought on the same basis would fail.[563] On the other hand, children rights would translate to *esipata e engerai* but this would only be used in reference to legal rights contained in treaties and other legal documents and would, therefore, be unenforceable through informal justice systems.

Among the Luo who border the Kipsigis to the North, a legal right (right contained in a treaty or law) is called '*ratiro mar dhano'* which loosely translates into 'the right way to treat a human being'.[564] However, the word 'my right' is non-existent among the Luo. Children's legal rights are, therefore *'ratiro mar nyithindo'* which would translate to 'the right way to treat children'. However, the two words are not used in the everyday conversations on claims around rights. The community, therefore, does not have an understanding of rights beyond the legal or convention view and all customary claims have to be made through non-rights-based language. The Kisii community, which borders the Kipsigis to the West do not have a specific reference for a right.[565] As such customary rights claims have to be navigated through a relational communication process rather than through a conceptual appeal.

However, Kipsigis customary law creates certain customary rights that are not recognised by state or international law. For instance, under national and international human rights instruments, children do not have a right to inherit their parent's property while the parents are still alive. In fact, the instruments are largely silent on this 'right'. Even the Kenyan Succession Act, 1981, which addresses questions of inheritance, only comes into force upon the death of a benefactor and as such does not grant any rights to children over their parents' property during the parent's lifetime. Even when such property is transferred to the son or daughter by the parent during his lifetime, it is considered as a form of gift and not inheritance, at least in the 'eyes' of the Succession Act. This, therefore, means that parents are generally free to transfer their property to a person of their choice, both within and without their family.

According to Kipsigis customary law, male children are entitled to a portion of their parent's land upon marriage even during their parent's lifetime.[566] This is because as observed in chapter

[559]Field observation in Emurua Dikkir
[560] Focus group discussion in Transmara-Emurua Dikkir
[561] Ibid
[562] Comparative field interviews in Narok
[563] Ibid
[564] Comparative field interviews in Kericho
[565] Comparative field interviews in Bomet
[566] Conversation with *Myoot* elders in Bomet

five and six, marriage (or a plan to marry) denotes maturity and the capacity to take care of land, therefore, justifying giving of land to the boys.[567] At the same time, it is presumed that the child gains more independence upon marriage and as such can cultivate his own crops on the land.[568] Still, Kipsigis customary law considers the parent as holding the land in trust for the children and a parent is thus barred from selling the whole ancestral land. Any sale can only be justified once the portion that belongs to the boys has been identified and reserved.[569]

Rights claims among the Kipsigis are activated upon the failure of care. When a dispute goes to the clan, family, *Kokwet* elders or the chief, the focus is usually to enforce the caring obligation of the negligent parent or clan member. However, when the three institutions fail to resolve the matter, they activate rights-based institutions such as the VCO who is expected to employ the language of children rights on the matter.[570] However, most VCOs often find it difficult to rely on the language of rights and equally have to fall back to the ethics of care. This is because rights are self-limiting and do not cover the entire purview of a child's well-being so that there are certain challenges that the Kipsigis child may face but which the language of rights either does not address or has no solution for. The VCOs, therefore, have to rely on customary claims to exhaustively handle cases where state law does not confer a legal obligation on anybody, such as in cases of child-headed household and orphans. Thus, when both parents die, children are usually left alone and other family members such as aunt's grandmothers or older siblings usually have an obligation to care for or adopt them in a customary arrangement discussed in the previous chapter. However, such an obligation can only be enforced through the language of care inherent in customary law and not in the children rights instruments. Rights consider such children to be those in need of protection and therefore a responsibility of the state but the state itself is largely absent in Emurua Dikkir and other remote areas such that such a classification would work against the very interest of the child if it was to be enforced. The following section proceeds from this basis to explore how Kipsigis parents respond to the language of rights and how this response violates and reinforces child well-being among the Kipsigis.

8.3 Mapping the rejection of children rights talk among the Kipsigis families

Chapter three argued that 'ordinary virtues' such as love, empathy, tolerance, forgiveness, trust, and resilience are better suited to anchoring human well-being than the language of rights.[571] Since rights are demands or claims, duty bearers sometimes find it uncomfortable to guarantee them since they are perceived to be antagonistic and based upon the doctrine of liberty, which is inconsistent with the social realities of the Kipsigis.

Well-being among the Kipsigis cannot be claimed on the basis of rights but through care obligations as discussed earlier. The members of the church, therefore, contributed money for Mildred's education not necessarily out of their concern for her 'right to education' or obligation to do the same but simply due to their generosity, faith, love and care for her and her parents. At the same time, her mother's concern for her education and well-being is a product

[567] Conversation with Elders in Olchobosei-Emurua Dikkir
[568] Ibid
[569] Ibid
[570] Multiple interviews with community members and chiefs in Bomet.
[571] Ibid

of cultural, moral and biological obligation of care rather than a product of her right to education and legal obligation. Similarly, her parent's position, that she has to go to the Ministry of Repentance and Holiness Church, is born out of their obligation to care for her as well as their customary and religious 'right' to 'guide' her. This logic flows from the assumption that parents know what is good for their children and that children, although bearing 'rights' may not know what is good for themselves (at least in the long term). However, the challenge with this perspective is that it relegates some rights (especially civil and political rights) to the periphery in favour of socio-economic rights such as education.

Children under Kipsigis customary law face a conflict of expectations. On one hand the Kipsigis child is generally considered as being mentally incompetent and therefore unable to make some decisions such as those related to religion. On the other hand, the Kipsigis child is considered as a full-grown being, and therefore capable of entering marital unions and bearing children or engaging in labour as discussed in chapter five. This clash of expectations is complicated by the fact that the realization of children well-being (whether understood as being rights or becoming rights) depends on the capacity and willingness of parents to guarantee them rather than the capacity of the child to claim them. Thus, although the realization of being rights would require Mildred's parents to abstain from interfering with her rights, such abstinence would be viewed as a forfeiture of her parent's customary right *(imanda)* to guide and correct her as well as a failure to comply with a customary and religious duty to guide her. Accordingly, the same would be viewed as violating the Kipsigis code of good parenting. The fact that the addressee of child rights instruments (the state) has only limited interaction with the subject of the rights-the child only works to render some rights unachievable and unenforceable among the Kipsigis.

The findings corroborate earlier findings by scholars that rights (whether conceived as customary or legal rights) give validity and legitimacy to a claim.[572] In other words when a Kipsigis child appeals to the 'right' to be given a share of his father's property, and tries to claim the same through the elders, he is neither enforcing his constitutional rights, rights under the children's Act 2001, UNCRC, ACRWC nor rights under any other children rights instrument. Rather he is laying a claim that he considers to be legitimate. His claim originates from customary law to which both him and his parents subscribe. Accordingly, such a customary right is generated by his community and not by state or international law. Removal of customary law from such a claim essentially extinguishes it. However, the same cannot be said of Mildred's 'freedom of worship'.[573] Although the Children's Act, 2001 only entitles children to religious education rather than freedom of religion, while UNCRC and ACRWC subject the same to parental guidance without defining the boundaries of this guidance, there are still plausible moral reasons for arguing that Mildred has freedom of religion.[574]

Mildred as a human being is, just like her parents, entitled to constitutional rights as well as to the rights guaranteed under the International Covenant on Civil and Political Rights. However, from the perspective of the parent, who is the duty bearer, such a right simply does not exist. First, because Kipsigis customary law is generally inconsistent with this right, and secondly,

[572] For such a view see John Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65 Current Legal Problems 1

[573] The language of the children's Act makes this right conceptually ambiguous. However, for analytical clarity in this context, this study proceeds from the constitutional assumption under article 32 that all Kenyans (including children) have the freedom of worship.

[574] S 8 of the Children's Act, 2001, cf art 14 of the UCRC cf art 9 of the ACRWC

because the Kipsigis community and Mildred's parents do not recognize or appreciate the international and to some extent, the national human rights instruments that provide the normative validity for Mildred's freedom of religion. In the absence of such recognition, Mildred's claim is interpreted as stubbornness and indiscipline that can only be addressed by the parent exercising 'their right' to discipline her. The location of such a right within the school system (at least from the perspective of the parents) rather than on any higher authority such as the state only works to make it less plausible because Kipsigis parents generally have a sense of ownership over the children and therefore do not feel obliged to adhere to the normative standards set by teachers and the state, unless they are convinced that such standards are morally legitimate or in the best interest of their children.[575]

The study found out that rights are sometimes implicit in the social affairs and interactions of the community and provide a framework for the realization of well-being and functionings that are implicit in international rights instruments. For instance, there are some child rights with a strong customary foundation among the Kipsigis such as the right to a name, the right to bride price from a parent during marriage (specifically for boys), right to inherit (even while the parents are still alive) and rights to customary practices such as male circumcision. Some of these rights may be missing from the list of rights in legal instruments but they are no less plausible than the rights in the Convention(s). In fact, to a great extent, they anchor the realization of the Convention rights.

As observed by the VCO in Mildred's case, the question of children's being rights is problematic when analysed from the socio-cultural context in which they are realised. Accordingly, some rights may not translate into 'real' rights when addressed through IJS. However, since administrative bottlenecks such as the lack of *locus standi* for children in court generally make it impossible for children to pursue their claims directly through the court, IJS are still the most practical and realistic mechanism of addressing questions of child well-being among the Kipsigis. At the same time, since some rights are not considered as 'rights proper' by IJS, the only rights that children like Mildred can pursue are those that are recognised by local agents such as chiefs and elders**.** These are often socio-economic customary rights.

It is observable that 'children rights' at the community level are largely negotiated outside the context of the democratic state in which the language of rights is most predominant. Since interests such as guidance and care for the child are fashioned in the language of obligation in customary discourses on child well-being, many children and their families pursue children's interests outside the framework of liberal rights. The emerging introduction of the language of rights by children due to the corresponding introduction of the same in school is therefore perceived by families and IJS as being problematic and disruptive. Within this context, the child's well-being is best advanced by an appeal to the language of affection love harmony and compassion.

Although possessing a right carries with it the right to seek remedies whenever this initial right is violated, the reality among Kipsigis children is different because the rights available to

[575] In a similar analysis Brenda Hale has demonstrated how a ban on corporal punishment in England by schools and the state, was vehemently resisted by parents on the basis that it was not in children's best interest. For a detailed discussion see Brenda Hale, 'Understanding Children's Rights: Theory and Practice' (2006) 44 (3) Family Court Review 350

children like Mildred (and as we shall see later, Kagendo) are not recognised by the most available remedial agencies –chiefs, elders, and VCOs; while the rights available under informal justice systems, such as the right to inherit parents land when he is still alive, are not enforceable through the formal justice mechanisms such as courts**.** Even when rights such as education, health and food are enforced by informal justice systems (IJS), they are not enforced on the basis of rights. Rather they are perceived either as the moral standard of treating children or as customary obligations to children but certainly not as rights. Within this context, forum shopping, in which both IJS and formal justice systems (FJS) co-exists remains the most viable means of guaranteeing children's well-being.

As noted above, parents rely on community structures such as churches to facilitate the realization of their children's education, health and other becoming rights. Any rights enforcement that threatens the relationships between the parent and the community also threatens the well-being of the child (and is therefore inconsistent with the child's best interest). As such it may be prudent to admit that Kipsigis children possess some rights that are inconsistent with their interest and which they should not claim.[576] Indeed evidence from fieldwork illustrates that parents' claim under *imandanyun* are not only respected by the elders but are also strongly enforced, a reality that continues to negatively affect children's being rights.

The integration of human rights in general and children rights in particular within the school curriculum has further aggravated the clash between parents and children over human rights claims among the Kipsigis.[577] Over the past 17 years, the government of Kenya has focused on mainstreaming children rights in the primary school curriculum. At the same time, primary and secondary school annual drama and music festivals have all been punctuated by children rights themes.[578] This, coupled with the prohibition of corporal punishment in school are initiatives that are meant to promote the rights of children. Indeed, this period has been characterised by a progressive awareness of children rights (by children).[579]

The idea is that a person who is well informed of his/her rights is better suited to claim them.[580] However, one missing link in these initiatives has been the exclusion of parents and communities. Human rights are counter-hegemonic.[581] Unlike mathematics or geography which are studied for academic excellence, human rights are meant to translate into emancipation. Children who study human rights in school are therefore expected to use the same language to advance their claims within the school, the family and the community. Rights talk in school is therefore meant to arm the child with a language of claim against the hegemonic parents, a situation which directly breeds conflict between the parents and community on one side and the school and children on the other.

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[576] A narration on rights that should not be claimed is articulated in Jeremy Waldron, 'A Right to Do Wrong' (1981) 92 (1) Ethics 21 and Herstein Ori, 'Defending the Right to Do Wrong (2012) 31 (3) Law and Philosophy 343

[577] Participant observation

[578] Conversation with the Children Officer, Kericho.

[579] Ibid

[580] Conversation with Children's Coordinator, Bomet

[581] See generally Michael Ignatieff, 'The Attack on Human Rights' (2001) 80 (6) Foreign Affairs 102, 108, 109

Part of the problem with children's right's claim, as the case is with Mildred is the question of ownership of children. Are children properties of their parents? The assumption from the perspective of Kipsigis customary law is affirmative. Within this context, harm inflicted on a child is considered as having been inflicted on the parent, and damage done by the child is attributed to the parent too so that disputes involving children under Kipsigis customary law are essentially disputes involving their parents.[582] This notion is founded on two problematic foundations: On one hand, the Judeo-Christian social system, onto which western (and modern Kenyan) civilization is founded expects the child to adopt the name of the father, essentially denoting some form of possession by the father.[583] On the other hand, the Kipsigis customary law considers children to belong to the father (and the father's clan). Accordingly, the interaction between Judeo-Christian conception of childhood (that was transplanted to Africa through colonialism) and African traditional conception of childhood has resulted into the deeply entrenched conception of children as property of their parent among the Kipsigis. Within this context, the parent is presumed to possess the inherent right to grant or withdraw benefits from children and to subject the child to pain or pleasure at will based on what in their view, is in the child's best interest. It is within this context that Mildred's rights claims are located. The parent's claim, that leaving their church would extinguish Mildred's education as the church would be unwilling to continue paying for a non-member, and appeal to 'the right to guide their child' are no more plausible than Mildred's rights claims. Accordingly, balancing the two may require an appeal to a non-rights based language or categorizations of the two sets of interests and elevation of the more important interest over the lesser one. This seems to be the balancing act that the VCO engaged in.

Having discussed the rejection of the doctrine of rights at the community level and the role of community members and families in the application of non-rights based language for children among the Kipsigis, the next section examines the depiction of rights in school textbook as a basis for exploring their translation into the daily language of claims by the children. Within the same context, the next section further explores the resistance of informal justice systems and communities to the textbook-based language of rights.

8.4 Children rights claims under informal justice systems and the representation of rights in school textbooks

8.4.1 Child rights claims under informal justice systems

Unlike the formal justice system where children cannot directly pursue claims unless through an adult, informal justice systems among the Kipsigis tend to be more flexible and allow children directly to report cases against their parents.[584] Thus several cases where children ran to the chief or VCO after their parents subjected (or threatened to subject them) to physical harm were encountered during the fieldwork. However, the children did not visit the VCO or chief to seek legal claims; instead, their visit to the chief /VCO was to seek protection from

[582] Participant observation.
[583] For such an argument see Barbara Woodhouse, 'Out of Children Needs Children Rights: The Child's Voice in Defining the Family' (1994) 8 (2) Bringham Young University Journal of Public Law 321, 322
[584] Field observation in Bomet, Kericho and Emurua Dikkir-Narok

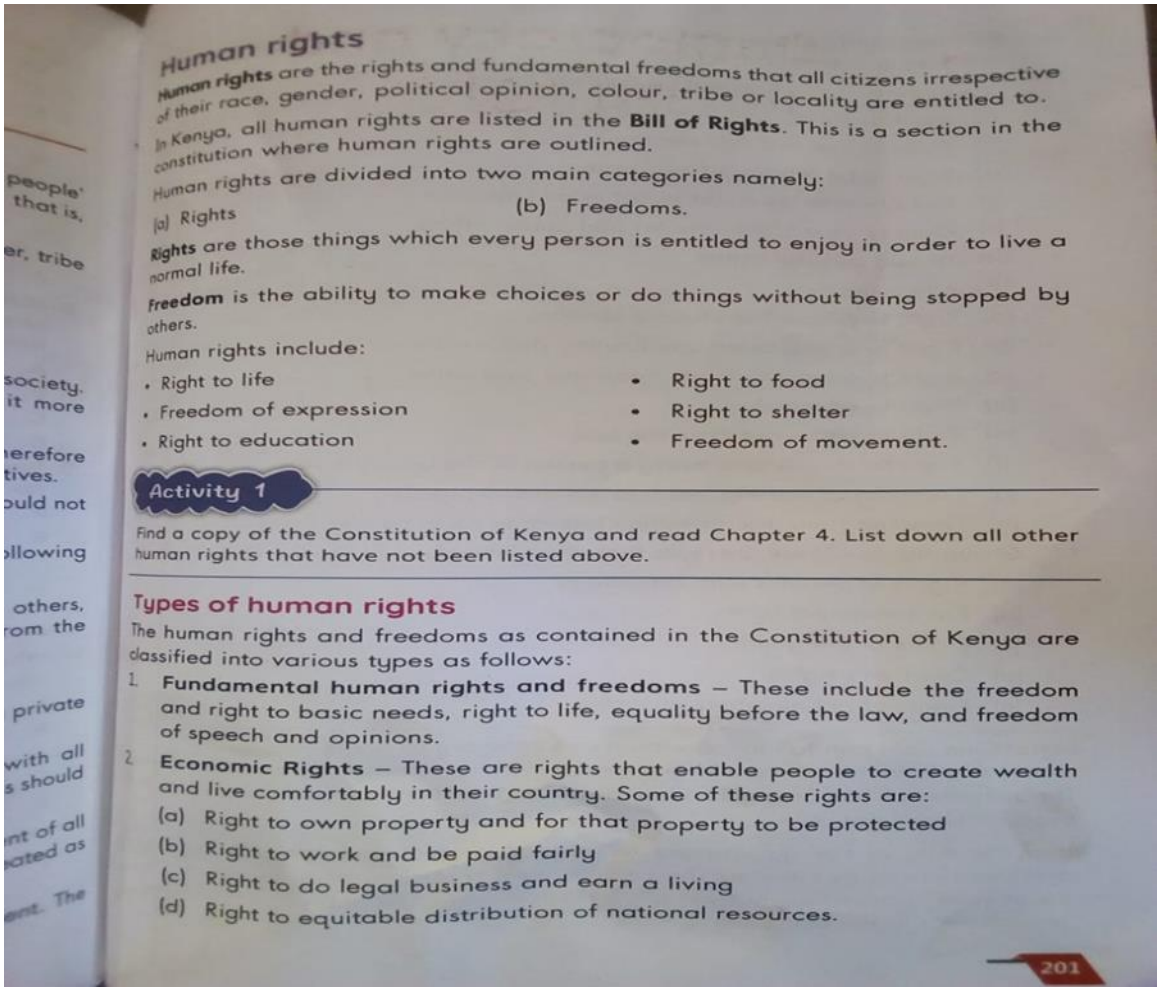
abuse.[585] Accordingly the chiefs and VCOs home acted as a form of refuge for children escaping abuse (or potential abuse) at home.

Although the fear of corporal punishment was one of the main reasons why children would escape to the VCO or chief, the dispute resolution sessions that would often occur upon the return of the child to his/her family would focus on reconciliation and forgiveness rather than enforcement of freedom from corporal punishment. In many instances, the VCO would accompany the child to her a parent as the child would generally be unwilling to go back home alone due to the fear of the original punishment and reprisal for escaping from home.[586] The process is characterised by an admission of guilt by the child, a broad discussion on alternative punishment and anger management, and finally a counselling session on respect for parents. Rights claims as reflected in schoolbooks are therefore overshadowed by restorative considerations that are anchored in customary law. Notwithstanding this reality both the chiefs and VCOs seemed to understand the legal prohibition of corporal punishment but saw the enforcement of this requirement as being impossible and undesirable.

8.4.2 Representation of rights in primary school textbooks

The presumption that rights originate from treaties and other legislations seems to be inadequate with regard to the rights claims of the Kipsigis child. Notwithstanding the fact that the rights in school textbooks have their origin in international conventions such as UNCRC and the ACRWC as well as in the Children's Act, 2001 and the Constitution of Kenya, children's claim to these rights are founded on school textbooks and proclamation by teachers.[587] In other words, when a Kipsigis child rejects 'child labour' or corporal punishment on the basis of a right, s/he is not appealing to some normatively justifiable concept or to some treaty but to the rights doctrines in school textbooks. Books, therefore, change from being learning materials in school into authoritative sources of rights. Teachers who are considered as academic heads rather than rights advocates become conduits through which the language of rights reaches the children. At the same time, it can be noted that school textbooks 'amend' some of the international rights doctrines to suit local contexts. For instance, whereas 'freedom from caning' is considered by children officers and courts to be an absolute right of the children, the school textbooks consider 'freedom from excessive caning' to be a violation of rights and not necessarily corporal punishment in totality.[588] For illustrative purposes, extracts from grade 6 and 7 Social Studies textbooks are captured below.

[585] Ibid
[586] Discussion with VCO Mogor- Emurua Dikkir.
[587] See fig. 12-15
[588] For illustration, see fig. 12 (c)



Human rights

Human rights are the rights and fundamental freedoms that all citizens irrespective of their race, gender, political opinion, colour, tribe or locality are entitled to.

In Kenya, all human rights are listed in the **Bill of Rights**. This is a section in the constitution where human rights are outlined.

Human rights are divided into two main categories namely:

(a) Rights (b) Freedoms.

Rights are those things which every person is entitled to enjoy in order to live a normal life.

Freedom is the ability to make choices or do things without being stopped by others.

Human rights include:

- Right to life
- Freedom of expression
- Right to education
- Right to food
- Right to shelter
- Freedom of movement.

Activity 1

Find a copy of the Constitution of Kenya and read Chapter 4. List down all other human rights that have not been listed above.

Types of human rights

The human rights and freedoms as contained in the Constitution of Kenya are classified into various types as follows:

1. **Fundamental human rights and freedoms** – These include the freedom and right to basic needs, right to life, equality before the law, and freedom of speech and opinions.
2. **Economic Rights** – These are rights that enable people to create wealth and live comfortably in their country. Some of these rights are:
   (a) Right to own property and for that property to be protected
   (b) Right to work and be paid fairly
   (c) Right to do legal business and earn a living
   (d) Right to equitable distribution of national resources.

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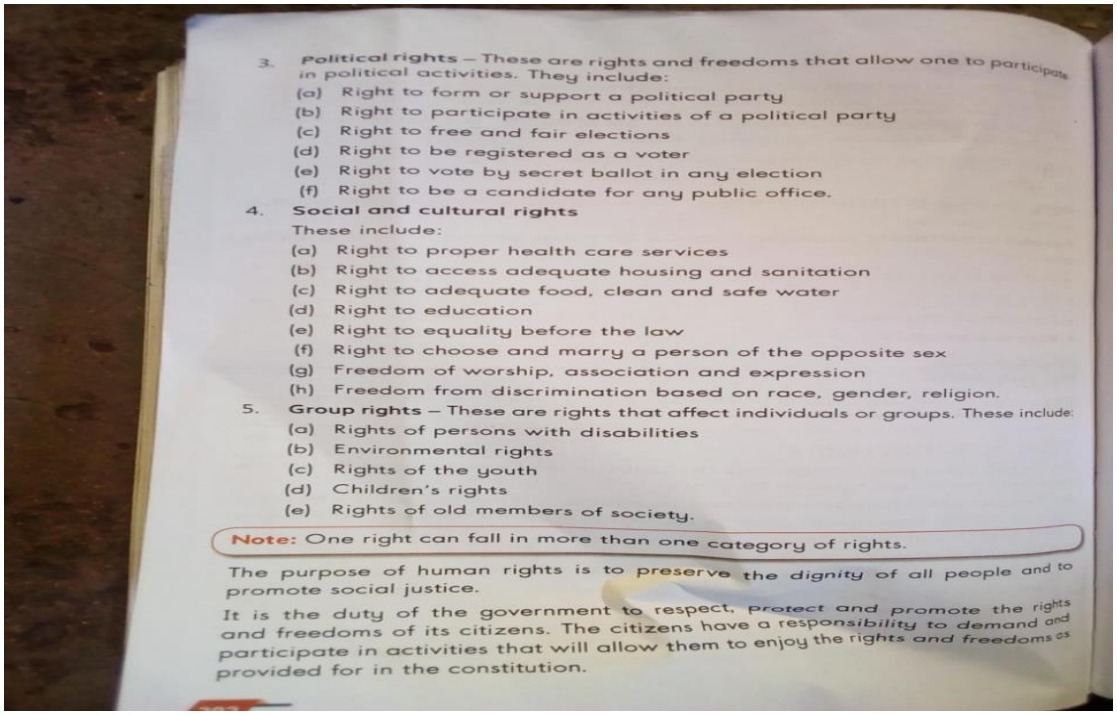
Fig. 12 (a) Representation of rights in primary school textbook



3. **Political rights** – These are rights and freedoms that allow one to participate in political activities. They include:
   (a) Right to form or support a political party
   (b) Right to participate in activities of a political party
   (c) Right to free and fair elections
   (d) Right to be registered as a voter
   (e) Right to vote by secret ballot in any election
   (f) Right to be a candidate for any public office.
4. **Social and cultural rights**
   These include:
   (a) Right to proper health care services
   (b) Right to access adequate housing and sanitation
   (c) Right to adequate food, clean and safe water
   (d) Right to education
   (e) Right to equality before the law
   (f) Right to choose and marry a person of the opposite sex
   (g) Freedom of worship, association and expression
   (h) Freedom from discrimination based on race, gender, religion.
5. **Group rights** – These are rights that affect individuals or groups. These include:
   (a) Rights of persons with disabilities
   (b) Environmental rights
   (c) Rights of the youth
   (d) Children's rights
   (e) Rights of old members of society.

Note: One right can fall in more than one category of rights.

The purpose of human rights is to preserve the *dignity* of all people and to promote social justice.

It is the duty of the government to respect, protect and promote the rights and freedoms of its citizens. The citizens have a responsibility to demand and participate in activities that will allow them to enjoy the rights and freedoms as provided for in the constitution.

Fig 12 (b) Representation of rights in primary school textbook

Other forms of child abuse are:

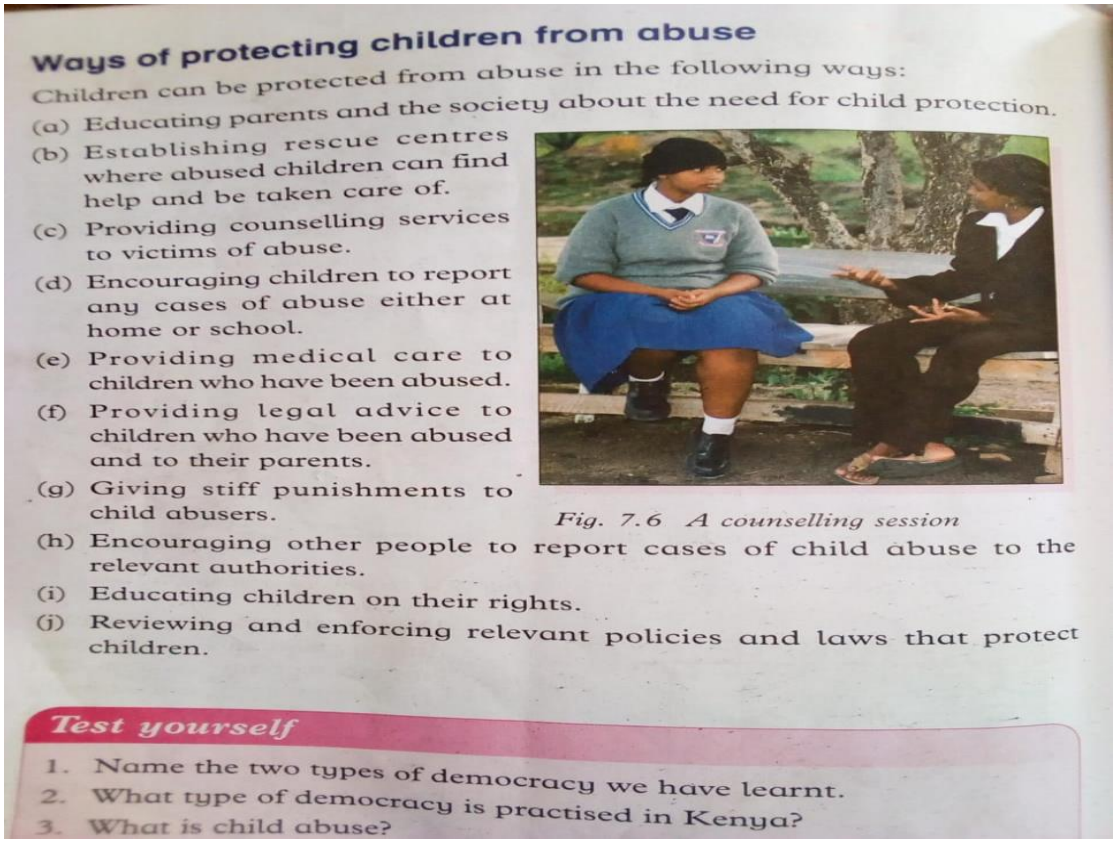
1. Child labour where children are made to work for money by some parents or by circumstances. Children may be forced to work as hawkers, domestic helps, tea or coffee pickers, cattle herders or as prostitutes.
2. Use of harsh and abusive language against the child.
3. Early child marriage before a girl is 18 years old.
4. Forced marriages when a partner is chosen for the child and the child is forced to get married to the partner.
5. Excessive caning or harsh punishment.
6. Mistreatment by other pupils (bullying).

Fig. 7.4 Heavy manual punishment

Fig. 7.4 Excessive caning

7. Displacement, for instance during political disturbances, leading to homelessness and separation from other family members. This denies children their rights to protection, safety and a good home.
8. Female genital mutilation (FGM) is also a form of child abuse since a girl child may be forced to get circumcised.

Fig. 12(c) Representation of rights in primary school textbook



Ways of protecting children from abuse

Children can be protected from abuse in the following ways:

(a) Educating parents and the society about the need for child protection.
(b) Establishing rescue centres where abused children can find help and be taken care of.
(c) Providing counselling services to victims of abuse.
(d) Encouraging children to report any cases of abuse either at home or school.
(e) Providing medical care to children who have been abused.
(f) Providing legal advice to children who have been abused and to their parents.
(g) Giving stiff punishments to child abusers.

Fig. 7.6 A counselling session

(h) Encouraging other people to report cases of child abuse to the relevant authorities.
(i) Educating children on their rights.
(j) Reviewing and enforcing relevant policies and laws that protect children.

Test yourself

1. Name the two types of democracy we have learnt.
2. What type of democracy is practised in Kenya?
3. What is child abuse?

Fig 12 (d) Representation of rights in primary school textbook

Teachers and school textbooks not only act as conveyors of rights from the state and international community to the grassroots but also as sources of rights. For instance freedom from displacement, which is considered as a child's right under fig. 12(c) above is largely overlooked by both the Children's Act and the UNCRC. Accordingly, the teachers' proclamation of what constitutes children's rights is part of the rights contestations that the child has to struggle with when s/he opts to use the rights talk at home, as most parents see this as an attempt by teachers to set normative standards at home. Since Kipsigis parents often see the home as being their terrain where they exclusively set and enforce normative standards, any encroachment by teachers is often resisted, to the detriment of the child.[589] In fact, one Emurua Dikkir parent interviewed for this study bluntly told the researcher that 'if teachers continue telling her child about rights, then she will inform them to keep the rights and the child' noting that she will not keep stubborn children 'in the name of rights'.

Most parents interviewed in this study considered the rights talk to be an attempt to elevate children above parents, and therefore both unacceptable and unrealistic.[590] The dichotomy between what is done at school and the expectations at home often means that such school-based rights are not appreciated at home as they are considered as part of the academic syllabus that should start and end in school. Any attempted translation of the book based rights to the home is often resisted by the 'local authorities' at home-parents and guardians who see rights talk as promoting indiscipline among children.[591]

[589] Multiple conversations with parents after *kipkaa* sessions.
[590] Multiple interviews after *kipkaa* sessions.
[591] Conversation with parents in Bomet.

Generally, what translates into 'children rights' at home are those entitlements that emerge from customs. These include the right to inheritance, specifically land inheritance, the right to build a home or a house, the right to undergo circumcision, the right to a name and the right to marry.[592] It is also noteworthy that names among the Kipsigis, as in many African communities, almost naturally occur. The right to a name in the Children's Act, 2011, school books and the UCRC is naturally realized. A child's name among the Kipsigis is culturally generated from his time of birth, season or ancestry and a parent usually has limited discretion with regard to the naming process. A naming dispute under IJS would thus be a dispute over which of the two or more culturally sanctioned names suits the child rather than a question of the right to a name. On the other hand, most, rights taught in school are largely unenforceable as rights under Kipsigis customary justice systems.

To be able to navigate the complex rights terrain, Kipsigis children have multiple positionalities.[593] On one hand, they have positioned themselves as vulnerable and therefore in need of care and protection while on the other, they continually act as globalised citizens who require modern education and the entitlements that come with globalization such as treaty rights (which they claim as textbook rights). Children have positioned themselves as active members of the Kipsigis community who are entitled to customary rights. Accordingly, they continually use culture to validate certain claims such as claims over inheritance. These multiple positionalities enable Kipsigis children to guarantee their well-being being by forum shopping across the different socio-cultural and ideological spaces in which they exist.

Rights are not claimed in the same framework in which they are articulated in the human rights instruments. Whereas conflict of rights between individuals can be addressed through judicial processes like court and extra-judicial processes like informal justice systems, those within the individual are more nuanced and sometimes involves sacrificing one right for the sake of another right.[594] The existence of Kipsigis children in multiple positions also generates rights and duties which more often than not conflict with each other. Accordingly, the widely held universalist argument that all rights are equal is unrealistic at least from the perspective of the lived experiences of the Kipsigis children.

Since rights are instruments of guaranteeing human well-being and interests, Kipsigis children are involved in daily processes of self-reflection in which the right that guarantees the greatest level of well-being is elevated above other rights.[595] It is within this context that Mildred opts to forgo her freedom of religion in favour of her right to education.

Many children interviewed during the study had to balance between their cultural, religious and legal obligation to respect parents (as enshrined in the children's Act, Kipsigis customary law and the Bible), their rights, and the 'right to claim those rights'. At the same time, they had to balance between the right to education, and for instance freedom from child labour. The case of Kagendo below best illustrates this reality.

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[592] Multiple conversation with elders

[593] For a discussion on multiple positionality of children see Maughn Rollins Gregory, Joanna Haynes, Karin Murris, *The Routledge International Handbook of Philosophy for Children* (Routledge,2017) 221

[594] Cf Jeremy Waldron 'Rights in Conflict' (1989) 99 (3) Ethics 503 cf Preda Adina, 'Are There Any Conflicts of Rights?' (2015) 18 (4) Ethical Theory Moral Practice 677

[595] Ibid

8.5 'Homework cannot be eaten': The challenge of balancing children rights and duties at the Kipsigis community level

> Kagendo was a class 6 pupil at a local primary school.[596] On the fateful day, her mother had asked her to help deliver tea leaves to the factory after school. Kagendo informed her mother that she had to do her homework otherwise she would be caned in school. Her mother, however, responded that 'homework cannot be eaten' and that she had to do the tea delivery. Kagendo then narrated how the teacher had informed them to report cases where they are forced into child labour to the chief or VCO, a response that irked her mother who decided to cane her. Having slipped through the caning, Kagendo ran to '*mama watoto'*.[597] *Mama watoto* allowed her to spend in her house and visited her parents, together with Kagendo the following day. After a heated session, the mother allowed Kagendo back but promised to visit the school and ask them why they were training children to be in-disciplined. She also noted that she had no problem with the homework, but that Kagendo had to help her deliver tea after school as the same would enable her obtain money to buy food and cater for her school-related expenses.

This case highlights the risk involved in the Kipsigis conception of rights. As noted earlier, rights in the African context are balanced with duties. Within this context performance of duties, such as helping in the farm, becomes the child way of contributing towards the realization of her right. Thus, although human rights instruments position the duty bearer to be a separate entity from the rights holder, Kagendo's case highlights the unique way in which individuals serve as both duty bearers and rights holders at the same time under Kipsigis customary law. For instance, in the understanding of Kagendo's mother, the 'right to education' is characterised by a duty to work towards the same, in which case Kagendo is expected to help in generating money towards her education and well-being. As such children are expected to adhere to cultural responsibilities, such as working with their parents to facilitate the realization of their education needs. This reality analysed from the perspective of the responsibilities conferred onto children by the Children's Act, 2011 and the ACRWC, is one way of operationalizing the African conception of rights. The role of the IJS such as chiefs, therefore, shifts from enforcing parental responsibilities to promoting a collective rights realization framework for parents and children and helping reconcile the child's responsibility with her rights. This approach to human rights goes against the rights conferred by school textbooks and human rights instruments.

It was generally noted that IJS seemed to be more concerned with situations where despite fulfilling her duties, the parents continually failed to fulfill his/her obligations to the child. For instance, in arguing her case before the VCO, Kagendo's mother argued that Kipsigis customs confer upon her the right (*imanda)* to discipline her child and that by keeping' her overnight, the VCO had violated this right. She even threatened to have the VCO keep both the child and the rights if she continued telling her about 'those rights'. Her argument essentially carried the day as the VCO had to step down from the rights talk to the parent's conversation around

[596] Case witnessed in Kericho
[597] This loosely translates into 'the mother of children'. This was the volunteer children's officer in Kagendo's Kipkelion-Kericho area

Kagendo's responsibility towards her. Kagendo's case perhaps reflects the daily challenge that VCOs and other rights actors have to endure in translating children rights into practice.

8.6 Summary

This chapter sought to respond to the question on the suitability of rights talk for children's well-being among the Kipsigis. In this regard, the chapter has examined the rejection of rights talk at home and the attempt by the rights language to permeable the semi-autonomous social field through teachers and school textbooks. However, this attempt has faced resistance from both informal justice systems, families and customary law. This is because rights are seen as promoting autonomy which is inconsistent with the way of life of the Kipsigis community. The question of autonomy is even more resented with regard to children who are seen to be the property of their parents. At the same time rights are seen as erasing the customary dichotomy between the parent and the child, therefore, establishing some form of abstract equality which as observed earlier, only works against the best interest of the child. Rights are therefore rejected because they are presumed to take away certain customary rights and duties of the parent and child such as the customary right to punish the child and the child's obligation to help his/her parents in domestic work. However, notwithstanding this reality, NGO, schools and government officers continue to advocate for (and sometimes enforce) the language of rights even against the wishes of parents and the community. Within the context of this tussle, children find themselves with two forms of normative ordering, the rights approach and the virtue approach. In view of these realities, many agencies are increasingly adopting a more dialogue-oriented perspective in which they seek to engage the community on the question of child well-being, perhaps in recognition of the inalienable capability of the community to resist rights imposition and entrench their value-based approach to child well-being. The following chapter explores the various dynamics involved in the cross-cultural dialogue.

CHAPTER 9

The place of cross-cultural dialogue in the promotion of child well–being

9.1 Introduction

Chapter five and six explained how and why the best interest of the child and child well-being are located within customary law rather than within rights among the Kipsigis. Chapter seven of this thesis explored the intersecting factors that underlie child abuse and the extent to which intersectionality as a concept explains the nature of the abuses and responses by informal justice systems. Chapter eight highlighted the tensions between the languages of care and ordinary virtues that are predominant at the community and informal justice level, and that of rights located in state law, state apparatus and school textbooks. This chapter (chapter nine) contributes to the thesis objectives by revisiting the dichotomy between customary and statutory conceptions of childhood and child well-being among the Kipsigis. Specifically, it explores the gap between formal child protection agencies and informal Kipsigis customary mechanisms. In line with the research questions, the chapter examines how state and non-state actors among the Kipsigis have tried to bridge the gap between the different conceptions of child well-being by facilitating cross-cultural dialogue between chiefs, elders, community members, government and NGOs. The chapter explores the different forms of cross-cultural dialogue within the Kipsigis community and highlights the challenges facing the dialogue framework across the study area. It concludes by acknowledging the immense opportunity that cross-cultural dialogue presents in combining customary conceptions of best interest with legal conceptions of the same but acknowledges the threat paused by the domination of the dialogue framework by formal state and NGO agents to the effectiveness of cross-cultural dialogue as an instrument for the promotion of child well-being.

9.2 Cross-cultural dialogue and the emergence of champions of child well-being among the Kipsigis

9.2.1 Understanding cross-cultural dialogue among the Kipsigis

By definition, cross-cultural dialogue is the process through which members of two or more groups come together to hold discussions on specific problematic phenomena with the view of coming up with a shared intercultural understanding on the same.[598] Cross-cultural dialogue has emerged as a mainstream approach in addressing human rights issues at the community level. Advocates of cross-cultural dialogue such as An-Na'im have posited that cross-cultural dialogue, with its bottom-up orientation, is helpful in addressing the challenges experienced in the top-down approach to the promotion of human rights.

[598] See Jurgen Habermas. *The Theory of Communicative Action: Reason and the Rationalization of Society (* Beacon Press 1984)

According to Martineau, cross-cultural dialogue exposes people to ideas, values, and forms of behaviour which may be radically different from those that they have been socialized to accept as 'true' within their own cultural traditions.[599] It requires individuals to 'modify their presently held beliefs and values, entertain alternative beliefs and values and to integrate at least some of these new beliefs and values into their own way of thinking'.[600] The Kenyan Anti-FGM Board, that uses dialogue to fight FGM, defines cross cultural-dialogue as:

> [A] form of intervention that involves interactive discussion, exchanging and sharing opinions and experiences such as those concerning female genital mutilation in a community. The dialogue is guided by a facilitator with the aim of reaching a mutual understanding between people. Dialogue is an exchange of opinions on an issue with a view to reaching an amicable agreement. Unlike debate, the emphasis is on listening in order to deepen understanding.[601]

As noted by An-Nai'm, all social practices among grassroots communities are, at least in part, justified by the members. As observed in the previous chapters, Kipsigis community members are generally reluctant to abandon certain traditional practices that they consider integral to their customary law and identity, even when sticking to them is considered offensive by state law.[602] To them, the moral position of state law, that informs the state's consideration of some aspects of their cultural practices as being criminal, originates from lack of understanding of their culture.[603] Accordingly, state agents and NGOs in Narok, Bomet and Kericho are increasingly abandoning the top-down approach which focuses on arrest and prosecution of people for FGM, child marriage and teenage pregnancy, in favour of cross-cultural dialogue.[604]

It is important to clarify the nature of cross-cultural dialogue in this study. On one side of the dialogue framework are the NGOs.[605] Although their dialogue forums are held throughout the year, their activities are usually intensified in the run-up to specific celebrations such as the World Children's Day, International Women's Day and the 16 days of Activism against Gender-based Violence.[606] Their understanding of the well-being of the Kipsigis child is shaped by international human rights norms such as CEDAW and UNCRC, as well as by the funding conditions and ideological orientation of international donor agencies and governments. Accordingly, their view of what constitutes children's rights is informed by universal

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[599] Wendy Martineau (n 335) 15

[600] Ibid

[601] Anti FGM Board, *Guideline For Conducting Community Dialogues* accessed from http://antifgmboard.go.ke/wp-content/uploads/2018/12/Guideline-for-community-dialogue1-1-Copy.pdf

[602] Participant observation

[603] Ibid and multiple conversations with elders

[604] Conversation with Programme officer- FEMNET

[605] NGOs interviewed in this study were World Vision, FIDA, KELIN African Women's Development and Communication Network (FEMNET), Centre for Rights Education and Awareness (CREAW), Gender Violence Recovery Centre (GVRC) and Legal Resource Foundation (LRF)

[606] The extent to which these international days has impacted on the cumulative awareness of the rights of the child is largely unresearched. However Leiden University has embarked on an ambitious project to explore this issue by examining how the international day of people with disabilities and the international decade on people with disability has impacted on disability rights. This research would have benefited from the findings of that study but the time of study does not correspond as the project is ongoing. For details see https://www.universiteitleiden.nl/en/research/research-projects/humanities/rethinking-disability-the-global-impact-of-the-international-year-of-disabled-persons-1981-in-historical-perspective#tab-2 accessed on 20 February 2019

conceptions of rights. Their measurement of programme success is the achievement of specific project goals that are designed together with their donors in line with international human rights standards. They are thus both ideologically committed to children's 'becoming rights' (socio-economic rights) as well as civil and political right (being rights), such as right to privacy. Although they are committed to children's rights granted by the Constitution and statutes such as Children Act, 2001, the Basic Education Act, 2013 the Prohibition of FGM Act, 2011 among others, their commitment is born out of the consistency between state law and international human rights law and not by their allegiance to the state.

Although primarily dealing with the treatment of victims of gender violence, Gender Violence Recovery Centre (GVRC) has been central in responding to cases of botched FGM and other forms of sexual violence against children.[607] Operating in Narok, Bomet and Kericho, GVRC has largely focused on rehabilitating survivors, grassroots referral mechanism and holding community forums on gender-based violence (GBV) under a joint UN funding with FEMNET and CREAW. The three organizations are part of a referral system that focuses on gender-based violence prevention, management and response. Accordingly, they all rely on their relative advantage to pursue specific aspects of gender-based violence in the community as well as during cross-cultural dialogue platforms. Dialogue is therefore seen as a strategy towards gender-based violence prevention. During joint dialogue forums, GVRC largely focuses on addressing matters around medical issues concerning FGM while FEMNET was mainly concerned with dialogue around gender-based violence.

CREAW, FIDA, KELIN and LRF largely deal with dialogues around children and women's legal matters while World Vision deals with general child rights and child protection. Although jurisdictionally dealing with cases of child and women disinheritance in Kericho and Bomet, the researcher observed that FIDA and KELIN are largely involved with the Luo Council of Elders due to geographical proximity. However, they were found to handle individual cases of child disinheritance from across the region, although geographical factors often made it difficult for most clients from Bomet, Kericho and Emurua Dikkir to reach them.[608] The study found out that KELIN and FIDA reinforced dialogue with formal litigation. They would engage with the elders in a dialogue platform to institute social change from within through capacity building of elders on human rights, refer some cases to the trained elders (and allow appeals from the elders) and institute legal proceedings in court if the decisions of the elders are ignored or if in their view, the decisions are manifestly unjust.[609] The two organizations noted that working with elders had led to an amicable and quick resolution of disputes which would otherwise take a long time in court and that this approach was most effective in re-integrating disinherited widows and children back to the clan. Although the formal legal processes, would yield the same (or better) short term outcomes for the women and children, it would create a long term enmity between the women/children and their families, essentially eroding the reciprocal care relationships that exist at the community level and therefore compromising their well-being.[610]

One challenge that has continued to bedevil the organizations is the translation of dialogue commitments into actual results. One programme officer laments:

[607] Interview with Programme Officer, GVRC
[608] Discussion with Programme Officer, KELIN
[609] Discussion with Programme Officers, FIDA and KELIN
[610] Ibid

> Some of these women speak very positively during the dialogue processes and change afterward. I remember this woman who came up to denounce FGM during our forums. We trained her and even took her to Nairobi to speak about FGM and we would facilitate her to continually speak against it in the community. As a former circumciser, we thought that people would take her more seriously. But recently, we learned that even though she had been speaking so much against it, she had recently circumcised her grandchildren. That really disappointed us and we had to drop her. We have several such cases where people attend the forums, denounce FGM then turn around to circumcise their own children or simply continue with their business as usual although secretly.

The second party in the dialogue spectrum is the government which includes the Children Officers, County Commissioners, County governments, Deputy County Commissioners, Gender and Equality Commission, Kenya National Commission on Human Rights and the Anti-FGM Board. Often these officials convene their own dialogue forums, although budgetary constraints and government bureaucracy often compel them to partner with NGOs. They perceive children's well-being within the context of the Social Assistance Act 2013, the Children Act, 2001, the Sexual Offences Act 2006 and the Constitution. Although the above legislations heavily borrow from international human rights instruments,[611] these bureaucrats are more oriented towards implementation of the domestic child rights instruments. Accordingly, they are more focused on the realization of socio-economic rights for children and less passionate about their civil and political rights. This is because the legal framework under which they operate grant children civil rights under the guidance of parents, a claw-back clause which essentially negates all children liberties and converts parents into the sole determinants of what would constitute child right for children. Put differently the bureaucrats are more concerned about 'rights for children' rather than children's rights. Secondly, the fear of antagonizing whole populations and the political consequence of this reality sometimes encourages government officials to compromise in their pursuit of children rights.[612] Other than the Anti-FGM Board, the other government institutions do not have a dialogue framework and their dialogue structures are organised on a case by case basis, based on the subject matter and the interests of the participants. According to the Board's dialogue guidelines, the community should be key in the selection of the venue and timing as well as in the mobilization of participants.[613]

The third category of dialogue participants is made up of street-level bureaucrats. These are the chiefs, VCOs and the various county officials who have daily interaction with the community members. As mentioned in chapter two, the chief is formally a civil servant employed under the chiefs Act while the VCOs is a volunteer community member working on child rights on a volunteer basis under the Department of Children Services. Because they exist at the community level, they employ both state and customary law in the resolution of children disputes. Chiefs represent their communities in cross-cultural dialogue forums with NGOs and other non -state actors where they advance (and sometimes even justify) the community's

[611] such as UN Convention on the Rights of the Child, African Charter on the Rights and Welfare of the Child, International Covenant on Civil and Political Rights and International Covenant on Social, Economic and Cultural Rights.
[612] Multiple conversations with children's coordinators, ACCs and DCCs
[613] Anti-FGM Board (n 601) 7

cultural position on child marriage, child labour and FGM while, on the other hand, working with government security apparatus to eradicate the same issues in line with state law and policy.

Sometimes, the dialogue forums take the form of a chief's *baraza* in which the chief is the core facilitator. In some instances, the *baraza* framework remains but other senior members of government such as the Assistant County Commissioner takes charge. The chief's and VCO's perspective of family as the primary custodian of children's interest, and their belief in the validity of some customary practices on one hand and the legitimacy of state law on the other, makes them a distinct group. The existence of the chief at the boundary of government and community often creates a situation in which chiefs have to navigate between customs (and customary law) on one hand and the government legal obligation on the other.

The other category is made up of community elders. These are often the *Kokwet*, *Olomasani* and *Myoot* elders who often strive to uphold the customs and beliefs of the community and represent them during cross-cultural forums. Firstly, since they all have interests and views on specific versions of customary law, they are not homogenous. Secondly, their individual levels of education vary significantly. Some of the elders are retired civil servants while others fall at the boundary of religion and custom; applying customs and religion interchangeably in various cases. They, therefore, range from the ultra-conservative elders in Emurua Dikkir to the 'moderate' in Kericho. Because of these variations, their interpretation of customary law and the place of elders in society also varies.

Elders who profess 'moral' transformation after the dialogue forums are thereafter trained on anti-FGM strategies, children rights, and other anti-GBV strategies. The idea is to transform them into home-grown change agents who are able to push for the abolition of practices that are considered to endanger the well-being of children and women.[614] One challenge of 'using' elders in transferring cross-cultural dialogue resolutions from the dialogue platform to the community is that, if they disapprove or resist the new realities, the same never reaches the community. Secondly, because the transmission of knowledge from the dialogue platform to the community is dependent on the cooperation of the individual elders and the extent to which they are integrated into the community, there is stark regional and clan variation in the eventual transmission of the new realities.[615] In the more conservative areas such as Mogor in Emurua Dikkir, an elder who embraces 'modernity' is presumed to have forfeited his status in the society and is no longer consulted on cultural matters. It was thus observed that notwithstanding the fact that several dialogue forums had been organised across Narok, Kericho and Bomet counties, the level of awareness on the dangers of FGM and similar violations was still inadequate.[616] This reality is confirmed by the Kenya Demographic and Health Survey which illustrates a high prevalence of FGM in the study areas.[617]

The high mortality rate and illness among elders have equally posed a challenge to dialogue convenors. This is because some of the elders who participate in the dialogue forums (and later

[614] This reality reflects Sally Merry's discussion about venacularization of human rights through local actors. For details see Merry (n 56) 134, 179, 269
[615] Participant observation
[616] Deputy County Commissioner- Bomet, Children officer-Sotik and Children officer- Kilgoris.
[617] Government of Kenya, *Kenya Demographic Health Survey-2014* accessed from https://dhsprogram.com/pubs/pdf/fr308/fr308.pdf 332 -333

become change agents) would periodically fall ill or die, therefore leaving a gap within their respective villages and or clans. This is because the selection of elders for dialogue is often based at the village or clan level such that if the 'morally transformed' elder dies, his course equally dies and the clan or village may revert to FGM or other forms of violence against children. According to stakeholders, this reality has created a need for continuous dialogue to ensure that the dead or infirm elders are replaced.

The fifth category of dialogue participants are community members. These are often the subjects of the dialogue. Although some organizations directly involve them at the dialogue platform, many organizations and institutions presume that the elders and chiefs would represent the community. Accordingly, their participation was found to be limited but very important. Organizations that conduct mapping often select those community members who had initially adopted the change message (by either willingly abandoning child marriage or FGM), because their responses and views are perceived to influence other participants towards the same direction during the dialogue processes.

The last category is religious leaders. They are perceived by NGOs and government as the progressive voices in the community. At the same time, they are both aligned to religious as well as to community conception of children rights which allow parents to cane children and perceive children as the 'property' of parents. They specifically cite biblical clauses to justify their positions. They also tend to retain the colonial perception of traditions and customary law as evil. Accordingly, their rejection of practices like FGM is anchored on their presumed religious obligation to do so rather than on the medical or legal grounds. Similarly, they perceive supporters and practitioners of FGM to be possessed by evil spirits and therefore deserving of prayers and exorcism. Their influence in this respect explains why almost all FGM practitioners resort to Christianity upon abandoning the practice. Religious leaders' rejection of FGM, therefore, makes them natural allies of government and NGOs who, however, reject FGM on legal and medical grounds. They are equally involved in prayers during and after intercultural dialogue as well as after alternative rites of passage.

The study noted that most Kipsigis people have plural identities where they are aligned to both Christianity and tradition. Accordingly, even families that had subjected their children to child marriage and FGM were found to be active members of various churches. To them, these practices were part of their identity and could therefore not be abandoned on religious grounds. Christianity and culture were therefore seen to be mutually exclusive except in 'African Traditional Churches' which had integrated aspects of culture into their religious practices.

9.3 Cross-cultural dialogue and the making of champions of child well-being

Several forms of cross-cultural dialogue were observed during this research. These include intrapersonal dialogue in which the individual would question his or her own values and select the value systems to adopt, interpersonal dialogue involving two or more people, intra-group dialogue within specific cultural groupings among the Kipsigis and inter-group dialogue involving several groups from different cultural standpoints as illustrated earlier. Intrapersonal dialogue was specifically found to be dominant among those who had abandoned their hard-line customary positions in favour of new perspectives upon cross-cultural dialogue. One elder in Emurua Dikkir opines:

> You know these World Vision people teach us very well. I did not take my girls to school. I only took the boys but now all of them are jobless and are staying with me at home. You see World Vision has now told us that even girls, when educated, can help their parents. If they had come here earlier, I would have taken my girls to school too. And you know, those who were teaching us were actually these small girls. You cannot believe it.

Intra-group dialogue was found to be dominant in establishing the rules that guide operations of the council and committees of elders. After a dispute resolution session, the elders would organize themselves and assign each other responsibility based on the nature of the case and the agreed points of action. If the case required cleansing, an elder would be appointed to conduct and or oversee the process. In instances where observing compliance with the decision of the Council or Committee of Elders was necessary, elders generally selected the ones that are closest in consanguinity to the conflicting parties to oversee certain points of action. This intra-group dialogue ensured that the councils or committees tapped into the strengths of each member.

It was, however, the inter-group and interpersonal dialogue forums that were most pronounced. These involved NGOs, government agents such as Children's Officers, Councils of Elders, chiefs and community members. Although chiefs and elders often engaged couples and children on interpersonal dialogue especially on the prevention of future conflicts, such interpersonal dialogues were anchored on customary based schemes of morality shared by both parties. Consequently, the conversations revolved around 'how to be a good Kipsigis man' a 'good Kipsigis woman' or a 'good child of the Kipsigis community'. Such interpersonal dialogues were however not strictly inter-cultural as the parties would often 'read' from the same cultural background. The challenge with these forms of dialogue is that they did not challenge any existing normative stands but instead focused on reinterpreting the same to sustain the resolution of the conflict. Accordingly, a violent husband would not necessarily be told to stop beating his wives completely but would be asked to avoid beating his wives 'unless it was necessarily' and only up to 'a particular limit.' This is because wife-beating was perceived as a customarily approved corrective mechanism by both the perpetrators and the elders. Phrases such as 'respect for the husband' and 'respect for the parents' were equally justified on the same premise. The normative foundation of wife and child beating was therefore unchallenged by the elder and chief's interventions. However, in some instances, the same dialogue would be anchored on appeal to Christianity or general morality in which violence against children and or women would be completely rejected through an inter-cultural dialogue with the violent husband. It is important to note that these sessions often took place after the dispute resolution process and specifically after most of the elders had dispersed. They were, therefore, reflection and 'counselling' sessions between the two parties and the chief or one elder and one of the spouses (mostly the man) or in cases of the children, a session between the child and the chief or one elder.

Interpersonal dialogue also informed the choice of VCOs and women rights champions at the community level. Most VCOs would be inducted through a training and thereafter an interpersonal dialogue process that involved rethinking and challenging of the widely held beliefs in the community. Such forums were either held as mentorship sessions between an experienced VCO and a new one or between the VCO and the Children's Officers. During these

sessions, the VCO would be able to express his/her fears and obtain assurance on the relevant support opportunities available among peers. One of the fears expressed by the VCOs is the possibility of community resistance and the security risk involved in challenging some deep-rooted and sensitive community practices such as FGM. This is because most communities had experiences of chiefs and VCOs either being physically harmed or stigmatised for discouraging these practices. The legal protection offered by the law and the police was not perceived as sufficient security for the VCOs. Thus, although the cross-cultural dialogue forums would help in morally transforming the VCOs into champions of children rights, interpersonal dialogue between the VCO and the Children Officers was anchored upon the personal challenges and risks of the VCOs. Thus many VCOs, (although sometimes ideologically opposed to the elders and chiefs) opted to work closely with them to gain acceptance into the community. Such an arrangement often required that they focus on the realization of child well-being (fashioned as children rights in their training) within the culturally approved context, a reality which precipitated the merging of customs, state law, morality and religion in child rights promotion at the community level.

Since VCOs were volunteers, their cross-cultural and interpersonal dialogues with the Children officers were anchored on their patriotic obligation to help Kenyan children rather than on their customary law obligation to Kipsigis children. In other words, in the eyes of the Children Officers, children in Bomet, Kericho, and Narok were part and parcel of a pool of Kenyan children whom the state has a responsibility to protect. These children had the same rights and responsibilities as enshrined in the Children's Act, the Constitution, UCRC and ACRWC. The VCO was therefore considered to be an appendage of the state in the protection of these rights. However, the VCOs perceived themselves as members of the Kipsigis community protecting Kipsigis children as part of their customary obligation to the Kipsigis community. This explains why they went beyond their instrumental training requirements into hosting and feeding lost children or those children who had escaped from their parents in fear of physical violence.

This difference in orientation between community patriotism and national patriotism was seen to create a schism between Children Officers and the VCOs and was often the subject matter of continuous discussion between them. Thus although Children Officers perceived state institutions such as borstal and rehabilitation schools as good for children, VCOs views were often aligned with the community's perspective which saw these institutions as being unsuitable for Kipsigis children since they were located outside the community. Continuous intercultural dialogue was thus crucial in bridging this gap and re-establishing a working relationship between the two. At the same time, the use of customary virtues of care and the customary standards of best interest, often created a difference in the treatment of children across the country because each community had its own customary law and therefore a different customary sense of care, virtue and best interest. This difference in the conception of best interest across the country is a cultural reality that the state through the Children Officers has had to adjust to although reluctantly. This variation in the status of children seems to be even more pronounced between the children in rural parts of Kipsigis land such as Emurua Dikkir and the ones in Bomet and Kericho towns. Such a reality has led to numerous exceptions in the implementation of most children policies and legislations across the country. Interpersonal and intercultural dialogue between the VCOs and the Children Officers thus helped in ensuring that relevant exemptions were made in a way that did not compromise the 'best interest of the Kipsigis child' or the underlying principles of the said legislation or policies.

As government bureaucrats, Children Officers do not generally come from the community whose children they serve. They are therefore expected only to stick to the relevant laws in discharging their mandate. However, it must be noted that these bureaucrats also come from other communities that have different conceptions of children and childhood. Consequently, they have constantly to engage with local players such as VCOs to gradually learn and appreciate the local customs while continuously struggling to understand their individual biases that are informed by their own customs. For instance, although teenage pregnancy exists both among the Kipsigis and the Samburu, Samburu customary law would validate the same and allow the man to marry the girl if the pregnancy was a culmination of beading.[618] Beading, therefore, validates defilement and by extension teenage pregnancy under Samburu customary law, and Samburu chiefs and elders would often validate the marriages of such girls on this account. However, as we have seen child marriage among the Kipsigis is anchored on a different cultural framework. A Samburu Children Officer working among the Kipsigis would, therefore, have to unlearn or reconcile his/her own customs with state law, international law and Kipsigis customary law through a process of intrapersonal and interpersonal dialogue. Such a process would often require him/her to engage the Kipsigis elders, chiefs and VCOs at the commencement of his posting into the Kipsigis areas. Similar realities also face Children's Officers from communities that do not traditionally conduct FGM on girls such as the Luo and the Abaluhya when posted among the Kipsigis. The presumption in state law that civil servants are culturally neutral is therefore inconsistent with the local realities in rural Kenya where bureaucrats are constantly renegotiating their own customs through intrapersonal and interpersonal dialogue. This illustrates Habermas' argument that an actor's behaviour is subjectively right (in the sense of normative rightness) if he sincerely believes himself to be following a subjective norm of action.[619]

For cross-cultural dialogue to succeed, each party must avoid considering his value system as superior to the other value systems and must operate on the basis of equality.[620] In essence, both the customary law on the treatment of children and state law on the same must be considered as being normatively equal, and agents of both value systems must operate on this basis. This is because both have the long-term goal of guaranteeing child well-being, even if they emanate from different perspectives. However, the challenge with the dialogue frameworks observed in this study is the presumed legitimacy of state law. In other words, whereas state law and state agents were presumed to be morally legitimate and therefore unquestionable, customary law and customary institutions were perceived to be inferior. For instance in its dialogue guidelines, the anti-FGM Board considers customary law as 'stereotypes' that should be challenged through dialogue.[621] At the same time, the broader outcome of the dialogue is pre-determined

[618] Beading is a cultural practice among the Samburu community which sanctions a non-marital sexual relationship between Samburu men in the warrior age group and young Samburu girls who are not yet eligible for marriage. It involves a Samburu warrior giving specialized beads to an uncircumcised girl to signify the commencement of a sexual relationship. The process begins with negotiations between the warrior, the girl's mother and her brother. Once the relationship is agreed, the girl's mother builds a hut for the couple where the warrior will have access to the girl for sexual intercourse. For details see Daniel Letoiye and Jacqueline Macharia , *The Unspoken Vice in Samburu Community*, accessed from http://www.iwgia.org/iwgia_files_publications_files/0752_ST_Girl-Child_beading_Research_in_Laikipia_Samburu_and_Marsabit_Counties.pdf on 12 January 2019

[619] Habermas (n 598) 127

[620] Ibid

[621] Anti-FGM Board (n 601) 7-8

(the abandonment of FGM) rather than moral transformation of the members of the Kipsigis community.[622]

State actors and the NGOs' feeling of moral superiority over customary law, chiefs and elders was further buttressed by the perceived superiority of written law and the human rights doctrine over the more fluid, highly contested and less discrete customary law. Accordingly, the logic, validity and veracity of customary law was the subject matter of many dialogue platforms. Of all the dialogue forums attended, none was centred on an examination of the validity of state law on children matters. Members of the community and elders were often asked to justify specific customary positions while the state's position on a similar matter was generally cushioned from criticism and interrogation. The fact that the elders would often disagree on the exact content of customary law on a given matter only buttressed the conception of customary law as being inferior to state law. The focus of the state agents and NGOs was thus on the moral conversion of the chiefs, communities and elders from their customary standpoint to believers in state law and doctrine of rights as enshrined in treaties. Accordingly, the sessions were mostly dominated by speakers highlighting the legal position with regard to FGM or child abuse rather than listening to the perspective of the chiefs, communities and elders and engaging in 'real' dialogue.

The inequality between the two parties is further illustrated by the fact that the subject matter of dialogue was selected by the NGO and government and not by the community. Thus dialogue platforms became civilizing opportunities where state agents/NGOs were the listeners while the community members were the speakers. Even the sitting arrangement had this dichotomy in which community members would sit together while the government officials would sit in front. Such an approach to dialogue challenges Evanoff's argument that:

> The goal of constructive dialogue is not to harmonize the existing conceptions, positions, interests, and so forth that individuals bring with them to the dialogue process, but rather, to engage in what Benhabib calls a process of "moral transformation"… The upshot of discourse ethics is that no positions are exempt from reflective criticism; all must be tested in the arena of public debate and all are open to negotiation.[623]

Accordingly the focus of many dialogue forums among the Kipsigis is not the moral transformation of both NGOs, government officials and communities, as Evanoff highlights, or in cross-cultural consensus as Habermas, Martineau and An-Na'im observe, but in how customary law can be 'amended' or adjusted to comply with state law or how community members can help the state to enforce state law by reporting 'lawbreakers' (customer law adherents) to state law enforcers. The presumed validity of state law, although cherished by positivist legal scholars like Kelsen, legal centralists like Ralf Michaels and systems theorists like Luhman has become one of the biggest challenges to the sustainability of community-based dialogue frameworks. This reality explains why some elders continue to resist alternative rites of passage and other cross-cultural dialogue initiatives that are meant to address child rights

[622] Ibid
[623] Richard Evanoff 'Inter-Cultural Dialogue and education' n.d. Aoyama Gakuin University Discussion Paper**,** accessed from http://archive.unu.edu/dialogue/papers/evanoff-s5.pdf 17

concerns. At the same time, most elders considered dialogue platforms to be exclusive. One elder in Bomet laments:

> When these NGOs convene to train people on these children matters, they do not invite everybody. They just invite a selected group of people who go there and completely betray culture. When they come back they are very much brainwashed. That is why we want them to invite real elders or leave the community alone.

The above complaint stems from the fact that the elders who are often invited to the dialogue forums are those that are seen as progressive and therefore fairly receptive to the ideology of the NGOs and government on matters relating to children (rights). At the same time, complaints against elders who had become 'career conference attendants' were very prominent in the community. These elders, it was claimed, 'would attend meetings hosted by government or NGOs 'from Monday to Monday' ostensibly to discuss the culture of the community but would never report back their deliberations to the community. In fact, some community members argued that such elders were more driven by the allowances paid to participants in such forums than by genuine community interest or commitment to the agenda of the NGOs and government. Their mastery of culture and perceived (or real) popularity in the community often meant that most NGOs and government officials working on cultural transformation among the Kipsigis would often be very keen to work with them. Although some did not occupy formal leadership positions in the councils or committees of elders, they were viewed as the direct means of reaching the other elders. In principle, they were seen as 'the gatekeepers of community gatekeepers' and were often cited as success stories of such NGO and government programmes.

One challenge with this category of elders is that their position on matters of customary law was seen to be valid based on their influence among the NGOs and ability to coerce and or influence the other elders to agree with them rather than on an objective analysis of these positions. Elders who expressed completely different views from theirs were therefore generally ignored and would never be invited to such meetings or conferences.[624] Majority of the 'compliant elders', although expressing their understanding of culture, were either staunch Christians or generally more educated and were, therefore, able to speak Swahili, the primary language/ among the culturally diverse NGO and government officials. The use of interpreters in dialogue forums was equally common but was highly resented as it created a perceived academic gap between the attendees. In other words, elders who did not speak Swahili or English were generally uncomfortable with the highly multicultural setting of the forums and would prefer more homogenous settings. This, however, posed a logistical challenge for the organizers because cross-cultural dialogue, in its very nature, presumes multiculturalism.

The above approach to dialogue often alienates the more conservative elders who often feel that the process is exclusionary, a reality which results in resentment against the new emergent norms from the dialogues. This reality echoes Habermas' claim that social norms are seen as having universal validity if they are arrived at through a process of un-coerced dialogue in which everyone concerned has had an equal chance to participate.[625]

[624] Interview with Ololmasani Elders in Olchobosei
[625] Habermas (n 598)

Most chiefs and elders were generally concerned with the wholesale condemnation of most of their dispute resolution verdicts during the dialogue sessions, without the dialogue partners looking at the underlying socio-economic realities under which these decisions were made. For instance, in view of community resentment against teenage pregnancy, parents resorted to marrying off their pregnant teenage girls at an early age because child marriage, although offensive to state law, was fairly tolerated in customary law. Thus, in the eyes of the community, the choice is not between marrying off the girl and not doing it but between marrying off the girl or having the girl suffer stigma at the family and community level or altogether having her thrown out of the home for embarrassing the family members. During the dialogue forums, the elders perceived their approval of child marriage in such cases as acceptable, an issue that NGOs and government were generally uncomfortable with on the basis of the Children's Act and the UCRC. Lamenting about this 'onslaught on culture', one elder observes:

> These many seminars are now corroding our culture. Once people attend them, they come back and do not want to listen to anybody .You tell them this and they tell you that, tell them this other thing and they tell you something else. Even children like you have now become impossible to control because they no longer listen to anybody. Once they go there and they are given that 500 shilling allowance, they now look at us as backward. For me, I cannot allow my wife or children to attend those things.[626]

Asked whether he could attend the forums himself, his answer was a resounding "No" emphasising that anybody who wanted to speak to him must go to his home.

Although the government or NGOs would often select the subject matter of dialogue, such selection was based upon the nature of donor funding (in the case of NGOs) and the policy orientation of the specific government official (or by both) rather than by the presumed best interest of the child principle. Thus issues that were seen to be of less prominence by government or NGOs were largely ignored.[627] One area in which dialogue was completely missing was the question of corporal punishment. Although the legal and human rights foundation of the prohibition of FGM and teenage pregnancy was the same as that which anchored the legal ban on corporal punishment for children, the issue was largely ignored in dialogue circles. Thus, although the researcher attended several dialogue forums, none of these explored the question of corporal punishment as a form of child abuse. This reality perhaps demonstrates the extent to which the practice is ingrained into the social system of the Kipsigis community and in the Kenyan society at large.

One set of critical players in community dialogue forums were the County Commissioners (CC), Deputy County Commissioners (DCC) and Assistant County Commissioners (ACC). Their dialogue forums were often centred on; the involvement of children in cattle rustling, child motorcycling, the use of traditional liquor among children, child labour and occasionally

[626] Ololmasani elder in Emurua Dikkir

[627] For an analysis of donor influence on justice initiatives and the implication of this reality on the process and outcome of justice initiatives, see Barbara Oomen, 'Donor-driven justice and its discontents: the case of Rwanda' (2005) 36 (5) Development & Change 887, 889

FGM. According to the CCs, DCCs ACCs interviewed, these dialogue platforms were anchored on the Constitutional requirement of public participation in governance and their obligation under the National government coordination Act to engage communities in service delivery.[628]

Their focus was to discuss specific government policies on the subject and receive the community's perspectives on the same rather than moral transformation of communities. To them, dialogue was a legal obligation. This dialogue framework, although less cumbersome, ignored the transformative nature of intercultural dialogue. This is because the CC, DCC and ACC, as noted earlier, did not explain the logic or legitimacy of state law but engaged in dialogue as a means of finding the most efficient way of enforcing state law. In contrast to the other players whose involvement with the subject matter of customary law was oriented towards learning and unlearning of their own biases, the CCs, DCCs and ACCs seemed to have an unwavering commitment to state law, a reality that perhaps originates from their identity as administrators and custodians of national security.

One challenge with ACC, DCC and CC led dialogue initiatives was the long-held fear of the community of government officials, especially those aligned to the security sector. It must be clarified that the DCC and ACC are the successors of the colonial District Officers (DOs) and District Commissioners (DCs) whose positions were abolished by the 2010 Constitution. Due to their immense power including the fact that they had administration police to enforce their orders under the pre-2010 legal dispensation, the DOs and DCs were highly feared in the community. This fear of the administrators seemed to have prevailed in the community even after the restructuring of the system to align them to the civilians and transfer of their functions to the ACC, DCC and CCs by the Constitution and the National Government Coordination Act, 2013. Accordingly, dialogue forums presided over by the ACC, DCC and CC were characterised by limited criticism of state law because the attendees either feared being targeted if they were to come out and for instance, confirm their approval of certain aspects of legally disapproved customs or fear of attracting excessive monitoring and attention from the administrators. Similarly, because the ACCs and DCC have powers to interdict and institute disciplinary proceedings against the chiefs, chiefs were generally unlikely to take positions that antagonize the administrators and or the state law. This reality essentially watered down the quality of dialogue forums presided over by the administrators and explains why dialogue forums organised by the NGOs or non-security related government officials such as Children Officers were generally more interactive and engaging.

However, even the dialogue forums organised by NGOs are characterised by some level of mistrust, however minimal.[629] This is because, during the dialogue forums, perpetrators of child abuse such as FGM usually come forth to explain the justifications for their actions and sometimes to renounce their practices. However, the fear that such a confession would be reported to the police by the NGOs remains. Although this was a realistic fear among the communities, the dialogue hosts, namely the NGOs and the Anti-FGM Board among other institutions insisted that this is not the end result of dialogue as it would erode any trust of the community in the process. This mistrust was partly born out of the reality that NGOs are members of a referral system through which cases that are reported to them are sometimes referred to the police or to hospital for legal or medical action respectively. Some NGOs, such

[628] Arts 10, 27, 33 of the Kenyan Constitution.
[629] Programme officer, World Vision

as CREAW, actually file cases in court on behalf of victims when they are civil in nature or watch brief in criminal matters involving children and were thus directly linked to legal processes. Thus, on one hand, they refer cases of FGM and child abuse to the police or to court when reported to their offices but on the other hand, try to pacify the community and encourage them to speak during dialogue by promising not to pursue any legal action against speakers. This dualist identity of NGOs has continued to compromise the building of sustainable trust necessary for productive sustainable dialogue among the Kipsigis.

One challenge that dialogue platforms continue to face is the question of gender representation. As an aspect of culture, most custodians of customary law among the Kipsigis are men. In fact, other than the few women in the *Myoot* Council of Elders, all the other traditional institutions are essentially male institutions. Even the office of the chief that is increasingly embracing women (and is legally expected to do so by the Constitution) still has a very minimal number of women.[630] This reality poses a challenge to dialogue convenors. On one hand, they are interested in holding constructive dialogue with the community without appearing to challenge any of their cultural beliefs while on the other they want women's representation in the dialogue processes, in line with their commitment to emerging legal and human rights trends. These overlapping interests usually pose operational and moral challenges. First, because in very conservative areas such as Emurua Dikkir, the inclusion of women in dialogue forums often generates resistance from the elders and men in general. Secondly, the inclusion of women, when done without the community's approval is considered to erode the customary validity and 'seriousness' of the dialogue process.

This is because some norms that the elders observe during their intragroup dialogue forums (which they sometimes transfer to the cross-cultural forums) expressly prohibit the inclusion of women. For instance, elders speak in form of hierarchy so that the 'youngest elder' has to give his opinion before the oldest elders. The value attached to each opinion depends on the age and status of the elder and not the substantive content of what is said. Women are therefore perceived to disrupt this system of holding dialogue because, under customary law, all women are considered as inferior to the male elders in status, regardless of their age. Their identity as women is also considered to water down the value of their opinions.

The Kipsigis perceive oathing, swearing and trust to be central to all forms of interpersonal engagements. Accordingly, most dialogue forums and all elders' meetings start with a request for members not to divulge the content of forum discussions or, at the very least, not to identify the speakers especially in cases of sensitive topics where illustrations of specific events are given and people in the community are mentioned either with disapproval or approval. This, in the words of one elder, 'is meant to promote intra-community harmony and prevent gossip'. Women are therefore excluded from these forums because they are seen not to be able to keep secrets or adhere to such strict codes of conduct in public events. The perception of women as 'gossipers' further justifies the resistance against their exclusion. At the same time, there are events such as male circumcision, cleansing, blessing, or cursing processes, which can neither be discussed with non-members of the community nor with women. These, coupled with the widely held belief that women are inferior and therefore cannot hold discussions with elders on equal terms explains why most elders are generally averse to the inclusion of women in the

[630] Art 27 of the Constitution requires the inclusion of women in appointive and elective position. Art 10 lists gender equality as a national value

dialogue processes. It was also noted that dialogue forums organised by NGOs had relatively more women than the ones organised by government agencies because NGOs employed deliberate strategies to include women while government insisted on working with the community structures as they were, regardless of their patriarchal structure. Unlike the NGOs government officials were thus found to be generally reluctant to challenge local patriarchal structures because challenging the same was seen as creating unnecessary antagonism with the community. Accordingly, they were very willing to have male elders represent all the other community members during dialogue. This gender blind and holistic consideration of one set of the community as representing the interest or views of both (Kipsigis) men, women and children, has been condemned by Martineau who argues that:

> The accounts of groups at times appear to implicitly rely on essentialist conceptions of cultural boundaries as fixed and clearly delineated. The descriptions of cultural or ethnic groups can fail to accommodate cross-cutting forms of difference, such as gender, which do not coincide with cultural borders.[631]

One of the counter-strategies employed by NGOs to tap into the voices of women was to meet male and female elders separately.

One problematic concern for the parties in dialogue was the question of 'who should dialogue on behalf of the community and how the new worldviews and perspectives that emerged from cross-cultural dialogue were to be communicated to the people?' The answer to these questions lies in a multifaceted dialogue framework in which NGOs/government hold dialogue sessions with selected community members or elders and chiefs, who would, in turn, be obligated to hold similar dialogue sessions with other community members. This snowballing of community dialogue would perhaps address the concerns of the elders who as discussed earlier, criticised the exclusionary nature of NGO and government-led dialogue initiatives for not having a mechanism of transmitting the outcomes of the dialogue to the community and assuming that the attendees would have altruistic motive to transmit the same. This means that the current benevolence based approach, in which dialogue participants are voluntarily expected to pass resolutions to the community members, must be replaced by an interactive process in which the community members are allowed to listen to engage and challenge such outcomes through a more pre-planned and organised engagement with the dialogue attendees. Although the elders are able to pass over this information their colleagues through their councils, NGOs and government officials must find a way of cascading this to the community members.

Unlike other players in cross-cultural dialogue who organize dialogue forums at County or Sub County levels, World Vision actually organizes village-based dialogue platforms with communities. The idea is to reach community members at the most basic level of social organization. The village-based dialogue forums are periodically held and constituted bigger dialogue forums at the County level which are held as an assembly of dialogues constitutive of members from different villages across the Narok and Bomet Counties.

According to the NGO officials interviewed, intercultural dialogues are not restricted to community setups as the programmes are often escalated up to the national level. For instance,

[631] Martineau (n 335) 22

under the tutelage of NGOs, children meet regularly with stakeholders at the national level to discuss their challenges and come up with practical resolutions on how they can be resolved. Thus, during the 2018 Children's Forum, the children resolved to:

- Speak up about our rights and ensure that our voices as children are heard by our parents, guardians, teachers, government officials and all leaders.
- Not to accept anything that violates our rights such as harmful practices, being forced to be involved in immoral practices, child labour and being denied education.
- Have discussions and dialogues with our parents, guardians and family members on how our lives can improve; and share with them about the rights of the children.
- Report all cases of child abuse and cases of denial of our rights to our parents, guardians, teachers, assistant chiefs, chiefs, other government officials and World Vision.[632]

A similar children's session organised by the Department of Children Services and UNICEF, 'dubbed National Children's Assembly' involves children meeting annually to hold discussions with stakeholders on the challenges facing them and come up with policy recommendations on how to move forward with the child protection strategies.

9.4 Cross-cultural dialogue and alternative rites of passage

FGM among the Kipsigis is considered as a rite of passage through which the girls must pass before they assume adulthood. Although the Constitution, Children's Act,2001 and Prohibition of FGM Act, 2011 bans FGM, elders and community members have often resisted all attempts at eradicating the practice.[633] Kipsigis girls, especially from Bomet, Emurua Dikkir and the wider Narok County thus continue to be exposed to the practice.[634] It is on this ground that World Vision runs community dialogue forums to engage the community members on the dangers of FGM and understand their perspectives on any alternative means of meeting the ends of FGM without actually carrying out the practice. World Vision specifically convenes community dialogue forums where participants engage World Vision officials on the customary foundation of FGM and explore culturally sensitive means of resolving the same. One of the outcomes of the dialogue is the alternative rite of passage (ART).

During ART, girls who have reached the age of initiation (between 8-12 years) are taken through a comprehensive reproductive health and life skills training for about two weeks. The trainings are conducted by World Vision officials in close collaboration with selected members of the community whose presence is seen as a way of boosting the social acceptance of the practice. Since FGM is premised on the idea of preparing the girls for adolescence and adulthood, ART is presumed as a logical way of achieving this end (preparing the girls for

[632] See https://www.wvi.org/kenya/article/children-steadfast-fight-against-injustices-affecting-them
[633] World Vision Programme Officer cf art 53 (1) of the Constitution. Cf Prohibition of FGM Act, 2011
[634] According to government statistics, the Somali community records the highest number of FGM cases at 94% of all women aged 15-49 followed by the Samburu (86) ,Kisii (84%), Maasai (78%),Meru(31), Embu (31) and Kalenjin (28) (The Kalenjin community consist of the Kipsigis, Nandi, Keiyo, Marakwet, Tugen, Elgeyo and the Sabaot speakers). The lowest prevalence is found among communities that do not traditionally practice FGM such as the Luo (0.2%), Luhya (0.4%) and Turkana 1.7%). For details see the Kenya Demographic and Health Survey (n 103)

adolescence and adulthood) without necessarily undergoing the actual cut.[635] Just like the elders are involved in blessing boys after initiation ceremonies, World Vision involves them in blessing the girls after the ART processes. This, it is argued, not only buttresses the cultural legitimacy of the practice, as An-Na'im would argue, but also ensures that the children are self-conscious of the cultural legitimacy of the ART so that they do not seek FGM after the completion of the programme.

A graduation ceremony is usually held after the function in which ART is often exalted as generally having a positive influence on girls. It is during this ceremony that the trainees are conferred certificates by the elders to show that they have undertaken the necessary lessons in hygiene and adulthood as required by customary law. During these ceremonies, community members would be invited to listen to speeches by elders and other opinion leaders in the community concerning girl's rights in general and FGM in particular. The process of ART is, therefore, a multifaceted collaborative process involving schools, World Vision, government, elders and communities. Attempts are often made to align the process with the education calendar. Accordingly, ART is usually done in boarding schools during the school holidays. The selected boarding schools are those within the community not only to facilitate the easy access by elders during the blessing sessions but also to align the process with the customs and promote community ownership by ensuring that the children remain within the community. At the same time conducting the trainings during school holidays ensures that as many girls as possible attend the forums as they wouldn't be constrained by school attendance. The choice of schools is also based on the assumption that education institutions are seen as child-friendly avenues and generally do not attract strong sentiments from the community. Schools were thus seen as neutral venues as the churches, which had been used as ART sites before, were divisive due to the fact that community members attended different (and sometimes even antagonistic churches) and would not allow their children into churches that they did not like.

It was noted that contrary to available counter-strategies, FGM as a social phenomenon is multidimensional. To the circumcisers, FGM is both a cultural obligation and an economic enterprise. Circumcisers are often paid between 1 to 3 euros and given a number of goats depending on the economic status of the girl's family. Thus although existing human rights strategies continue to target the girls, reforming circumcisers through skills training and dialogue remains to be an uphill task as they are largely ignored by most change agents. Under its '*It takes us all*' programme, World Vision has tried to embrace deliberate strategies to reach out to circumcisers with a view of involving them in dialogue. The long term implication of this approach is a concern that requires additional study.

9.5 Challenges facing community-based cross cultural-dialogue

The dichotomy between childhood and adulthood among the Kipsigis community and indeed among the various Kenyan communities has compromised the impact and validity of children's dialogue platforms at the national level. As noted earlier, the grievances of children are largely against parents and communities but these members are never invited to the national and child-specific regional dialogue forums to engage with children. The failure by the organizers to appreciate the power structures at the community level has led to the exclusion of the actual

[635] The question as to whether the girls actually feel like adults after the training and how this interacts with child marriage and teenage pregnancy requires further research.

policy implementers- the elders, chiefs and parents and has generally led to resistance against the children's resolutions and outcomes.[636] Thus implementation of the resolutions made at the children's forums are considered as the sole responsibility of government and NGO and are completely rejected by the communities, partly because they pilfer back to the parents through the children on one side and the NGOs and the children officers on the other.[637] Similarly, since such children's forums are conducted at the regional or national level without any consideration of the socio-economic and cultural situations of each child, the resolutions sometimes fly in the face of highly entrenched cultural realities which often contribute to their rejection from the outset.[638] Thus, as highlighted in earlier chapters, the doctrine of rights, that has often been the rallying call of these forums, continues to generate resentment and resistance among parents at the grassroots level. In fact according to the Children Officers, many of the children's resolutions never actually get to the parents at all.[639] Although called dialogue by NGOs, there is very little actual dialogue that takes place because children rarely hold very strongly onto the cultural positions that are presumed to be the subject matter of intercultural dialogue at the national level. Instead, these sessions are more of discussions and awareness raising sessions on children rights rather than actual dialogue opportunities.

Dialogue forums organised at the community level have violence against children as the main subject matter but rarely involve children. This is because they usually take the format of *baraza*s which are presumed to be adult forums. Even when they attend, children are presumed to be passive participants whose voices are never listened to. In fact, it may be considered as indiscipline if a child was to raise an issue that contradicted his/her parent's (or any elder's) position on a given matter. This is especially buttressed by the assumption that children know nothing about customary law due to their age. The few children who manage to attend these forums are mature minors,[640] i.e. those children that are presumed to have adopted adult responsibilities by marrying, dropping out of school or joining the labour market.

There is also a presumption among community dialogue organizers that children's voices can be represented by their parents and that the parents (or adults in general) would always speak in the best interest of their children, at least in these forums. However as observed in their recommendations at the National Children's Forum, children may interpret realities differently from their parents such that their exclusion from community dialogue forums denotes the exclusion of a critical voice that may help shape the dialogue platforms towards a better realization of children's rights and well-being. The gendered nature of social interactions implies that women exclusion in dialogue forums, discussed earlier, translates to the exclusion of girls. Thus even among mature minors, male mature minors generally attend more dialogue forums than female mature minors while girls who are victims of teenage pregnancies are generally unlikely to attend the forums due to the stigma associated with teenage pregnancy.

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[636] Interaction with elders, chiefs and NGOs
[637] Conversation with Children's Coordinator, Bomet
[638] Ibid
[639] Discussion with Children Coordinators in Kericho and Bomet
[640] In Western Jurisprudence, a mature minor in considered as a child who is over 15 years and is able to make decisions over his/her future. This conception however does not describe the Kipsigis mature minor since age is not a factor in the determination of a Kipsigis minor .Accordingly a mature minor in Kipsigis understanding of the same would be that minor who is involved in activities that are presumed to be for adults such as marriage and childbearing. For a western understanding of mature minor see Ann Eileen Driggs, 'The Mature Minor Doctrine: Do Adolescents Have the Right to Die?' (2001) 11 (2) Journal of Law and Medicine 687

Contrary to state law and NGOs' assumption that children are passive victims of FGM, teenage pregnancy and child marriage, teenage girls are active agents in these practices. As noted by one elder in Emurua Dikkir, some children among the Kipsigis 'actually want FGM'. Sometimes girls run away from their family and voluntarily seek the services of the circumciser. Their parents only learn about it after they are asked for money or a goat. At other times, they escape from home and opt to get married to either older men or their age mates. Parents only become aware of this reality when the would-be husband comes to negotiate pride price. According to the Children Officers, such realities call for a change of strategy from that of simply listing the legal protections and responses available for the children during dialogue, to actually debunking the different justifications embedded in children over time through socialization. Such a strategy, he argues, requires a cross-cultural dialogue with children themselves to examine their reasons for participating in the practices. Human rights training and any other prevention and response strategy should follow up after cross-cultural dialogue. Resistance from the community, over a community-based dialogue with children, or inclusion of children into adult-based community dialogues has however compromised the possibility of this strategy due to the perception that it would 'poison the heads of children.'[641]

Another challenge that has continued to bedevil cross-cultural dialogue initiatives is the question of sustainability. It has been noted that since behaviour change takes a long time, there is a need for more long term cross-cultural engagements to achieve meaningful results.[642] One of the key issues is that although donor funding is tied to projects and usually timed to end over specific periods, cross-cultural interventions usually require a long time to have a meaningful impact on communities.[643] Accordingly, communities often relapse back to the old practices unless all the underlying factors behind the practices are addressed by the cross-cultural interventions over a long time.[644] This may sometimes include sustainable economic empowerment of circumcisers and long term education interventions for the communities.

The ability of government to take up some of the initiatives after the exit of NGOs or the replacement of one project NGO by another, have been cited as seamless means of ensuring continuous dialogue. A key challenge, however, is that some NGOs either change strategy or change the dialogue spear-headers in the community, therefore compromising the continuity of the previous project. Dialogue initiatives run by the government equally run into financial problems due to the fluctuation in government priority programmes. Thus when government priorities change, the original programme is abandoned too.

9.6 Summary and general reflections

9.6.1 General reflections

Martineau contends that culture appears as a homogenous "whole" only from an external vantage point. From within, a culture presents itself through shared but contested narrative accounts which form not a seamless whole, but 'a horizon that recedes each time one approaches it.'[645] Thus as noted above actions that the state considers to be illegal such as FGM

[641] Discussion with Children's Coordinator, Bomet.
[642] Discussion with Programme Officer, FEMNET
[643] Interview with Programme Officer, GVRC
[644] Ibid
[645] Martineau (n 335) 22

are sometimes considered to be in the best interest of the child by the community. Accordingly, the gulf between the state and the community has not only antagonised the relationship between the state and non-state actors, but also led to the resentment of the foundations from which each ideology originates. Community members, therefore, resent state law while the state, although forced to work with customary institutions, tend to perceive customs as the driving force of the vices

To reconcile these two positions, NGOs are increasingly adopting a middle ground. Originally, NGOs were focused on the application and implementation of universal instruments and spent a sizeable amount of time and resources publishing international as well as domestic children rights instruments in local languages.[646] The idea was that community members abused children because they did not understand children rights and the solution was thus teaching them children rights through trainings, workshops and conferences, while also making user-friendly versions of the child rights instruments in local Kipsigis language. Through lobbying at the national level, the NGOs managed to convince the state to integrate the language of rights into the curriculum with the view that this would empower the children to claim their rights. This 'Western' approach was bound to fail. As noted by Narayan:

> Failing to be sufficiently attentive to context can lead to treating practices as 'cultural' whilst failing to see the complexity of tradition formations and the contestation over claims of the centrality of a practice to the culture. Assessing 'other' cultures by Western standards can thus obscure the complexity of cultures and create the impression that other women and children are oppressed 'victims' of their cultures.[647]

According to the NGOs interviewed, cross-cultural dialogue has been helpful in reorienting communities from passive receivers (and sometimes resistors of change) to partners in the change process through a consistent moral transformation. Although cross-cultural dialogue remains a key pillar of child rights realization from below, there is a need to address the question of exclusion. One option to address this problem of women and children's exclusion would be to begin, by holding dialogue with elders on women and children's participation in community dialogues more generally. Kipsigis women spend relatively more time with the children and are central to their upbringing and meaningful dialogue must, therefore, promote and enhance their participation. Their exclusion, even if the children were to be included, would be counterproductive to the best interest of the children. Once there is moral consensus on participation, women, men and children can take an active role in the dialogue process on child well-being.

9.6.2 Summary

As noted in chapter one, this research explores the role of informal justice systems and customary law in the protection of child well-being and rights. However as observed in the last eight chapters, 'child rights' is a contested concept that although accepted at the formal child protection level, is highly resisted at the community level, especially by informal justice

[646] Programme Officer, World Vision
[647] Narayan cited in Martineau (n 335) 63

systems. The language of customary virtues and care is not wholly accepted by the formal child protection agencies who consider it to be open to abuse by customary structures such as informal justice systems. It is within this contestation that children attempt to claim their best interest by trying to enforce their rights as taught in school. However, the tension between formal conceptions of best interest (that is found in school textbooks) and customary conceptions of the same interact with the tensions between care ethics and rights talk to blur the conception of child well-being and convert it from a discrete issue into a more contested matter that is negotiated by both the children, communities, informal justice systems, government and NGOs.

It is on this basis that this chapter observed the attempt by NGOs and some government agencies to reconcile the above positions by holding cross-cultural dialogue platforms to address the underlying concerns of all parties and contribute to the moral transformation of the Kipsigis community. Several strategies have emerged in this respect key among them the alternative rites of passage which is meant to substitute FGM. Notwithstanding this efforts, cross-cultural dialogues have continued to face challenges such as the exclusion of children and some categories of adults and the domination of cross-cultural dialogue by formal agencies through an exclusive selection of dialogue framework and topics. Similarly, a lack of the means of transmitting the outcomes to the community remains a big challenge and creates resistance. Despite the above challenges, cross-cultural dialogue seems to respond to the questions of whether there is a possible reconciliation between customary standards of child well-being and legal child rights standards. The dialogue approach emerges not as a way of imposing one framework over the other but as a means of building a culture of child rights and well-being through a give and take cultural negotiation process. The following concluding chapter makes this even clearer by revisiting some of the key observations in the research.

CHAPTER 10

Conclusion

10.1 Introduction

The first chapter provided the methodological and theoretical base of this thesis. The next two chapters highlighted the current scholarship on the subject and the various contestations. The last six chapters of this thesis presented the key findings of this research and highlighted the extent to which those findings meet the research objectives and respond to the research questions. This concluding chapter re-examines and responds to the key questions in the research through a general reflection on some of the key observations and highlights how the findings fill identified knowledge gaps and interact with the existing status of knowledge discussed in chapters two and three. The last part of this chapter presents the different areas that require further investigations in a bid to comprehensively understand the nature of child rights (and in principle human rights) protection under informal justice systems.

10.2 'The courts and police are news': Researching (customary) law among the Kipsigis.

Researching the conception of customary law among grassroots communities often exposes a researcher to ongoing contestations between the various players who are involved in the (re) construction of customary law. This contest involves the state, religious forces, the chiefs and elders, the community and non-state actors such as NGOs. Each party tends to perceive customary law as that which can be appropriated to fulfill certain ends. Firstly, the state through ossified customary law contained in statutes and law books attempts to reposition itself as an institution that is sensitive to the realities of its citizens. However, the customs reflected in statutes and law books are sometimes inconsistent with local realities so that state agents often have to either amend them and adopt the living customary law that exists among the people or risk absurd outcomes and community rejection. This dilemma especially faces magistrates, who have to interpret customary law as well as Children Officers and County Commissioners who sometimes have to rely on customary law to resolve interpersonal and intercommunal conflicts. Secondly, the state in a bid to minimize resistance to children rights language, attempts to train elders on children rights and use them to resolve child-related disputes in a way that meets the end goal of state law, specifically the Children Act and Prohibition of FGM Act without directly offending customary law. Customary law, interpreted by these trained elders is often aligned to the doctrine of rights contained in human rights instruments. The extent to which this form of customary law is truly customary is an issue that has preoccupied legal pluralists for a long time.

This relationship between the state and elders is mostly mediated by the NGOs who pursue broader global human rights goals that are aligned to and guided by donor conceptions about human rights. Thus although the state enacts laws to protect children in line with its international obligations, such legislations always come up against the forces of customary law resulting into situations in which the state is compelled to negotiate for a space for its laws by

alienating some elders from their customary settings. However, sometimes this strategy fails and the state is forced to sacrifice some elements of its own laws (and possibly of international law) as a trade-off to have other laws accepted within the semi-autonomous social space as identified by Moore and Zwart. Corporal punishment for children, as discussed in this thesis provides a very clear example of these tensions. Part of the reason for this failure as discussed in chapter nine, is that many countries in Africa have areas with an absentee state; areas in which state institutions are often too far away or altogether missing. These vacuums are thus filled by customary law institutions and to some degree NGOs that hold sway over governance and dispute resolution because as explained by one elder in Emurua Dikkir 'the courts and police are news' in these areas. Although institutionally distant, the capacity (and tendency) of the state quickly to mobilize and enforce certain aspects of formal law has made communities and elders increasingly to abandon or modify certain aspects of customary law that the state considers irredeemably offensive. The state thus uses a 'carrot and stick' approach to deal with offensive elements of customary law in an ongoing trade-off and accommodation between customary and state law. Notwithstanding this trade-off, there is, as identified by Beckmann 'scapegoating of customary law' and customary law institutions in which customary law is blamed for all development and human rights problems among the Kipsigis.[648] Children officers see customary law as being inconsistent with human rights in general and children rights in particular and often urge the VCOs to keep away from customary law and customary institutions. However, the gaps in state law often compel children officers to resort to customary law to resolve some children matters that fall outside the domain of state law.

The second category of players is elders. Elders are generally central to informal justice processes and are seen as custodians of customary law. However as noted by Beckmann, the elders themselves have interests which they pursue through a particular interpretation of customary law. They not only resist changes in customary law but are generally averse to any intrusion of the customary sphere by 'outsiders'. Researchers who want to engage with the elders, especially through direct participation in the dispute resolution processes must not only comply with the customary requirements but must also reach out to them through gatekeepers who are essentially elders too. Even when included in the elders' sessions, some issues are considered to be too sensitive (or secretive) and researchers, or any other 'outsiders'- including government officials are often asked to leave. Since participation in some sessions requires one to have undergone certain customary rituals, 'outsiders' are often excluded by the very fact that they have not undergone the same rituals. For instance, some aspects of initiation, marriage or divorce ceremonies among the Kipsigis can only be conducted in the presence of those who have undergone a traditional Kipsigis marriage. Those who by virtue of not being Kipsigis, or due to religious or civic reasons did not undergo such marriages are often excluded *ab initio*. At the same time, the oath of secrecy that attendees undertake often means that whatever happens in those settings can never be revealed to 'outsiders'. Within this context, elders manage successfully to shield some aspect of customary law from external intrusion and therefore maintain their relevance on the same.

The third category of players in the (re)negotiation of customary law is the community members. Community members often embrace a changing conception of customary law which is sometimes different from the elders' interpretation. These differences often play out in the dispute resolution process in which varied understandings of customary law can emerge. Since

[648] Beckmann (n 118)

the elders' version of customary law often prevails due to their perceived status as the ultimate customary authority, members who are dissatisfied with the elders' decisions forum-shop to new dispute resolution platforms such as courts to enforce customary law claims or redesign their claims to fit within state law. One challenge with exploring customary claims through courts is that in some instances, courts invite the same elders for their expert opinion on the matter, refer the matter back to the elders and chief or use ossified customary law which may be completely different from the realities in question. This practice raises a dilemma for the members who forum-shop outside the informal justice systems into formal justice systems.

Most 'imported' religions such as Christianity and Islam can position some aspects of customary law to be evil and deeply secular. Elders who are practising Christians often try to align their view of customary law to Christian teachings. They perceive some customs as deeply secular and would seek to justify customary law positions such as the child's obligation to respect parents not on the basis of tradition but on the basis of Christianity. Such elders sometimes recuse themselves during sessions that they consider offensive to their faith such as divorce sessions or cleansing ceremonies. Although such elders may go for interpretations of customary punishments that are less severe, the convergence between customary law and Christian teachings, such as in cases of corporal punishment leaves the child in a worse situation. At the same time, the Kipsigis socio-legal space is characterised by cross-referral of cases from church elders to community elders and vice versa based on the nature of the dispute at hand. This reality denotes the existence of several layers of pluralism within customary domains and problematizes the assumption of a unified conception of customary law.

The use of grounded theory in my ethnographic study of the Kipsigis has revealed these layers of pluralism that would otherwise have been ignored through other methodological approaches. The application of analytical frameworks of intersectionality, rights, living law, legal pluralism and care ethics provided an appropriate basis through which to analysis the generated knowledge. Drawing on this combination of analytical frameworks not only helped bring out the nuances in the socio-cultural realities of the Kipsigis but also highlighted the value of an interdisciplinary approach to the study of customary law, human rights and legal pluralism. In particular, it helped navigate the translation problem that is widely discussed in the Bohannan-Gluckmann debate. Translating customary law concepts into a foreign language raises the risk of loss of meaning. Since concepts such as law, justice and rights are all understood differently under customary law, discussing them via a foreign language increases the possibility of misappropriation of the concepts. Faced with this challenge, the researcher opted to discuss the concepts in the local dialect in which they are used and to identify the underlying principles behind such concepts in the customary context.

The ethical requirements of undertaking such research presented challenges because the research process required a set of permits from the state and yet some of the issues in the study, such as FGM, which were still prevalent in the community, had been disapproved by the state. Since this study involved the chiefs, the first point of interaction between the researcher and the community was through the chiefs. The question that arose was whether the researcher was an independent person within the ongoing socio-legal customary law contestation or a party within it. This ethical requirement therefore created a mis-perception that the researcher was at least, ideologically aligned to the state and the chief. It generated some unease especially when topics such as child marriage were discussed. Dissociating from the state tag and building an independent reputation was time-consuming and cumbersome especially with regards to

children. The researcher therefore had to minimize the time spent with the chief, sit with community members during dispute resolution sessions (and not with the chief), interact with motorcyclists at the local shopping centre and attend community forums such as churches. The fact that the researcher lived within the communities during the research period also helped in trust building.

10.3 Juris-generation of customary law and the 'otherness' of girls

The extent to which the Kipsigis society creates and recreates customary laws to regulate specific circumstances outside the confines of the state revisits Eugene Ehrlich's scholarship on the nature of living law. Ehrlich, in his book on 'Fundamental Principles of the Sociology of Law' highlighted the plight of the Bukowina child, who has a sharp resemblance to the Kipsigis child.[649] In Bukowina, (his birthplace in the Austro-Hungarian Empire), the Austrian Civil code required everybody to be paid for their own work. However, the living law of the Bukowina community prohibited giving money to children as payment for labour.[650] Accordingly, any payment that was due to children as a result of their work was paid to their parents. He, therefore, notes that the Austro-Hungarian state law was inconsistent with the living law of the people in Bukowina. His argument, that state law with its 'external origin' should be reconciled with the living law of the people, has been developed by An-Na'im and Woodman.[651] The researcher's observations with regards to child motorcycling among the Kipsigis illustrates this point well.

Although state law prohibits children from riding motorcycles, rural communities do not see a problem with child motorcyclists. The fact that the same motorcyclists actually carry adults and the approval of the same by parents denotes some level of tacit acceptance (or tolerance) of the social practice. The institutions set up by the state to deal with such 'offences' such as the Department of Labour, Children's Officers and the police find themselves on the opposite side of the Kipsigis living law. Their enforcement of legal rules that are at variance with the socio-economic realities of the Kipsigis community reveals what Santos and Hoekema call multiple legalities (or as Pospisil puts it, legal levels) and the extent to which it alienates different legal players from each other.[652] Children officers, far from being seen as a 'children's saviours' -as implied in the Children's Act, -becomes state-sponsored 'monsters' who are resented not only by the children but also by the community whose children they seek to protect.[653] Within this context, the Volunteer Children Officers (VCOs) who should be the representative of the Children Officer at the grassroots level find themselves tilting towards the community's conception of law and rights and to some extent, validating the same actions that they are expected to help eradicate. As an active participant in community affairs, and due to the fact that he/she is a community member who is well conversant with the cultural realities of the

[649] See Ehrlich (n 11) 61
[650] Ibid
[651] Ibid see also An Naim Ahmed, 'The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law' (2010) 73 (1) Modern Law Review,1 cf Gordon Woodman, ' Legal Pluralism and the Search for Justice (1996) 40 Journal of African Law, 152
[652] For a discussion on multiple legalities see Bonaventure Santos de Sousa, *Towards a New Legal Common Sense: Law, Globalization and Emancipation* (Butterworths 2002) cf Andre Hoekema, 'Multicultural Conflicts and National Judges: A General Approach' (2008) 2 Law, Social Justice & Global Development Journal 1, 3 cf Leopold Pospisil, 'Legal Levels and Multiplicity of Legal Systems in Human Societies' (1967) 11(1) Journal of Conflict Resolution 2
[653] Interview with children officer, Bomet

community, the VCO often reinforces customary norms that may sometimes violate children's well- being.

Motorcycles are not indigenous to the Kipsigis community. They are imported forms of transport technology that have only been able to permeate rural areas like Bomet and Narok in the last 10-15 years. The fact that the community has a customary regulation of motorcycles that restricts women /girls to passengers while allowing men/boys to generate income from them not only points to the different ways in which societies reproduce patriarchy to oppress women and girls but also highlights societies capacity in (re)producing customary laws.[654] Berman's argument, that rural communities have the power of juris-persuasion- the extent to which societies develop social boundaries and articulation of their laws-and Cover's concept of juris generation best explains this reality.[655] As Cover argues , communities may sometimes create and give meaning to their own conception of law in ways that emanate from and even generate violence against one group either within or without the community.[656] This partly results from interpretive divergence that characterise all forms of legal regulation.[657] Thus, even among the *Kokwet* elders and chiefs, contrasting interpretations abound on the restriction of girls from riding motorcycles with some chiefs pointing out that the practice is a product of broader social consensus rather than any strict taboo among the Kipsigis.[658] Such elders and chiefs also note that the absence of any strict penalty for girls who defy this convergence of behaviour and decide to ride bicycles denote some general tolerance to female motorcyclists but that girls are not exploiting this opportunity.[659]

10.4 Re-examining children rights within plural legal system: Revisiting the ongoing contestations.

A key objective of this study was to examine the way in which grassroots communities respond to the language of child rights and the implication of this response to the child's best interest and well-being. An understanding of the nature of children's well-being within plural legal contexts requires an appreciation the social construction of those rights.[660] As discussed in chapter five, local customs generate rights which are neither recognised by international children rights instruments nor by state mechanisms. However, their enforcement is important for the realization of children's well –being, specifically the protection of the best interest of the child –which is revered in child rights instruments.

State and the international human rights regime create and recreate rights which may sometimes be incompatible with local realities. Although some of the elements of these rights seep through the semi-autonomous social field through the various agents as pointed out by Moore and Zwart, there is only a selective reception of elements of rights into the social infrastructure of

[654] See Woodman (n 96) cf (n 149) 162
[655] See Berman Paul, 'Dialectical Regulation, Territoriality and Pluralism (2006) 38 Connecticut Law Review 929
[656]Ibid 40
[657] Ibid
[658] Focus group discussion with elders in Kericho
[659] Conversation with elders in Bomet
[660] For a discussion on social construction of children rights see Michael Freeman, 'The sociology of childhood and children's rights' 1998 (6) 4 International Journal on Children's Rights,433 See also Mayal Berry, 'The Sociology of childhood in relation to children's rights' 2000 (8) International Journal on Children's Rights ,243

grassroots communities such as the Kipsigis.[661] NGOs and governments are the key drivers of these rights through, for instance, cross-cultural dialogue and school textbooks. However, such interventions continue to elicit resistance compelling rights institutions such as Children officers to rely on chiefs and elders to use customary law as a way of promoting the reception of child rights and enhance child protection. Customary law institutions, therefore, become an instrument through which states attempt to overcome resistance to rights in general and children rights in particular. Children rights, that are rejected by the community, such as autonomy, liberty and equality for children, become more of what Glendon calls 'rights talk' than enforceable entitlements.[662] The same becomes more problematic when translated into school textbooks as they often pit the children against their parents who often reject both the rights and their normative framework. This reality calls for a more nuanced approach to the promotion of children's well-being. As Na'im, Zwart and others have argued, such an approach should focus on generating well-being from below through the gradual development of the culture of rights onto the social infrastructure of the community, appreciating the customary foundations of human rights and promoting those customary practices that enhance children well-being. This project must start by acknowledging the dual roles played by parents and communities in child rights-namely the protection of one set of child rights on one hand and violation of another set of rights on the other. At the same time, such an approach must appreciate the multiple positionalities of children and the different ways through which it acts as a positive impetus to the safeguarding of child well-being and child agency.

As Woodhouse puts it, promotion of children's well-being would be more fruitful with an appreciation of a more child-centered, relational and evolving understanding of children rather than a blanket transplantation of treaty rights onto grassroots communities.[663] Since rights presume equality between a parent and child, parents among the Kipsigis are generally resistant to any language of children rights. Part of the reason is that the presumed equality between the two parties in the rights contest ignores the Kipsigis socio-cultural reality in which children are presumed to be inferior to and answerable to their parents. Any presumptions of equality between the parent and the child not only creates resentment against the language of rights but also against the child and is therefore inconsistent with the child's well-being since, under customary law, the well-being of the child is tied to the well-being of the parent. Antagonizing the child's care provider, such as parent is therefore seen as undesirable and counterproductive to the child's well-being.

Personal space for children at the community level is appreciated purely on the basis that they are 'immature beings' who need their space to play and interact with each other. This personal space for children is however guaranteed without antagonizing the welfare family, clan and community system onto which the child's overall survival is based. Since autonomy is neither desirable nor possible for Kipsigis children, first due to the high level of symbiotic dependency in communities and secondly due to the dependency of children on their parents and the community on one hand, and the dependency of the parents on the community on the other, any conversation on the autonomy of children as a matter of right cannot be sustained by the current

[661] See Tom Zwart, 'Using Local Culture to Further the Implementation of International Human Rights' (2012) 34 (2) Human Rights Quarterly 546, 555 cf Moore (n 12)
[662] See Glendon (n 28)
[663] Barbara Woodhouse, 'Are You My Mother? Conceptualizing Children's Identity Rights in Transracial Adoptions 1995 (2) Duke Journal of Gender Law & Policy 107, 109

customary infrastructure and any attempt to do so may be counterproductive to the child's well-being. As observed by Minnow, 'Something is terribly lacking in rights for children that speak only of autonomy rather than need, especially the central need for relationships with adults who are themselves enabled to create settings where children can thrive'.[664]

This is not to 'disapprove' of children's being rights but to acknowledge the continous nature of social change especially with regard to the realization of children's being rights.[665] Since such a project is undoubtedly a long term one, communities such as the Kipsigis are likely to achieve more if the well-being of the children is fashioned within the everyday language of claims-that is the language of care and virtues. At the same time, there is a need to examine how children actively play a central role in the realization of their well-being. The mechanisms through which Kipsigis children are considered as duty bearers and subjects of protection under customary law is a matter that invites the attention of child protection agencies. In other words, the experience of Kipsigis children shifts the concept of a child from passive recipients of protection to active duty bearers of their own well-being. The rights language must embrace these realities if it is to leave a mark in the Kipsigis social space.

Although international human rights law considers the state to be the ultimate custodian and guarantor of children rights, the reality is that the state is rarely involved in matters concerning the upbringing of children. State officials charged with children matters such as children officers are often sparsely placed and generally removed from the daily lives of children.[666] As we have seen, they only intervene in children matters as and when these matters are reported to their offices, a relatively rare phenomenon since most child-related disputes are resolved through community-based dispute resolution structures such as IJS. Parents and guardians remain to be the primary guarantors of children rights among the Kipsigis. Since parents are the main custodians of 'their' children's well-being and may determine the extent to which the same is realized, any attempt at developing a culture of children rights must incorporate parents and the community.

The rights in school textbooks, that promise emancipation for children and expressly point out that teaching children about 'children rights' is one way of promoting children's well-being, achieve much less than promised, and only bears fruit when augmented with a more parent and community-driven approach.[667] Unlike women and other oppressed groups, children cannot politically mobilize into a pressure group to claim their rights and to a great extent must rely on the goodwill of parents, teachers and the community to realize them. [668] In other words, what amounts to 'the right of a Kipsigis child' in practice is what the community consider that right to be and not what the school textbooks and by extension teachers, consider the rights to be.[669]

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[664] Minnow cited in Michael Freeman, 'The Future of Children's Rights,'(2000) 14 Children & Society 277, 280

[665] I use this term to denote the children's liberty rights such as privacy, autonomy and freedoms. For details see Freeman (n 230)

[666] Field observation and conversation with children officers

[667] For an illustration of rights in school textbooks, see fig. 12

[668] For such an argument see O'Neill (n 234), cf Abdullahi An-Na'im, 'Cultural Transformation and Normative Consensus on the Best Interests of the Child (1994) 62 (8) International Journal of Law and Family 62, 73

[669] In the recent past there has been a significant resentment by teachers in Kenya against children rights on the basis that it promotes child indiscipline by eliminating corporal punishment which teachers consider to be the primary instrument of punishment.

Balancing duties and rights within the context of the African human rights framework is a challenge that has continued negatively to affect the realization of children rights.[670] Both the ACRWC and the Children's Act, 2001 lists duties of the child. These duties emerge from African communities such as the Kipsigis. For instance, a Kipsigis child is not only required to help his family and clan in household duties but is also expected to be very respectful to elders and older siblings. The duties under Kipsigis culture are similar to those in the Convention and the Act. Kipsigis customary law allows for the violation of (children's) rights on account of his/her failure to perform the above duties. For instance, refusing to help parents in domestic work (or even non-domestic work) and disrespecting parents or elders in general, would justify the parent's failure to pay school fees, corporal punishment or denial of basic needs such as food and in extreme cases even shelter. Thus, whenever a claim over the performance of parental duties to the child came up before the IJS, the immediate line of defence for most parents was the perceived (or real) failure of the child either to perform his duties in general or failure to perform them to the expected standard. In one of the cases witnessed in Bomet during this study, a parent refused to continue paying school fees for Joseph-his son, because the child was a poor performer in school. According to him, the poor performance negated his duty to pay school fees to this particular child. He noted that the money 'wasted' on this child could be used to pay school fees for his other 'hardworking children'. All attempts by the chief to convince the man to continue paying school fees failed. Eventually, the chief and elders had to validate his decision.[671]

Whereas the right to basic education under international and national human rights instruments is independent of the child's performance in school, the same is highly qualified in Kipsigis discourses on children's education and as such is highly dependent on the child's performance. Part of the reason for this relationship is that the international and national instruments do not consider the socio-economic and cultural realities of the right to education. Realizing full rights for children thus requires an analysis of how rights such as education interact with duties and economic realities to militate against the child's interest. The politically sensitive language of rights, therefore, collapses when juxtaposed against socio-economic and cultural realities at the community level. The violation of children rights, on account of responsibility is, therefore, a product of a social system that is averse to Convention and legal rights claim for children. To address this, there is a need for more robust engagement with the doctrine of *imandanyun* that is, for instance, used by children to claim inheritance rights among the Kipsigis. There are however some strategies to this end through cross-cultural dialogue in which NGOs seek to enhance the culture of rights (*imanda*) that already exists among the Kipsigis. Findings from the fieldwork, demonstrated that the inconsistency between the community and state conceptions of rights has increasingly compromised the success of cross-cultural dialogue.[672] As noted by Hunt, rights can only constitute a strategy of social transformation if they become part of 'common sense' and are articulated with the social practices of the people concerned.[673]

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[670] Jean Didier Boukongou, 'The Appeal of the African System for protecting Human Rights' (2006) 6 (2**)** African Human Rights Law Journal 268

[671] Case witnessed in Sigor Bomet

[672] Participant observation.

[673] Alan Hunt, 'Rights and Social Movements: Counter-Hegemonic Strategies'(1990) 17 (3) Journal of Law and Society 309, 325

NGOs and government agencies are beginning to embrace what Sally Merry calls 'vernacularization' in which cross-cultural dialogue is increasingly being used as a strategy for translating human rights into locally understood conceptions.[674] However, a great deal more needs to be done in this respect because the current dialogue approach, although successful in improving awareness on human rights matters, has failed to generate a widespread and sustainable moral transformation that is necessary for the development of an effective human rights culture. Although noted by An-Na'im as a response to cross-cultural differences in human rights, the dialogue process is itself subject to internal and external forces that attempt to appropriate and direct it towards certain policy or practical ends. In view of this challenge, this research would strongly suggest that the most logical approach would be to first pause the process of vernacularizing child rights and build upon the positive elements of the local conceptions of justice and child well-being as a way of guaranteeing the child best interest. An-Na'im, Zwart, Mutua and Wiredu's view that each culture contains certain values that are consistent with human rights and which can be tapped into to anchor child wellbeing at the community provides a good starting point for such an initiative. Informal justice systems, as noted in the research remain the most inbuilt community-based system of justice that guarantees this reality. Their approach to children's matters is crucial in addressing the underlying causes of child rights violation and establishing customary building blocks that can anchor child well-being in the future.

Exploring the protection of the best interest of the child under customary law was another key objective of this thesis. The study revealed that best interest is not only contextual but is based upon integration of the child into his community, compliance with customary law by the child and his/her parents and concern for long term over immediate interest. These findings respond to Mnookin's concern over whether the best interest principle denotes immediate or long term interests.[675] However, it was also noted that a focus on long term interests by informal justice systems sometimes involved violation of immediate interests, an issue a reality that possibly offends the widely held position by the Committee on the Rights of the Child that children rights and interests are indivisible.[676] Due to intersectional and regional factors, what is good for children in one region may not be good for children in another region even within the same country. Similarly, what is in the best interest of a boy may not necessarily be in the best interest of the girl. The universal conception of children as having similar interests must, therefore, be revisited.

10.5 Rethinking child rights within the context of care.

An examination of the underlying principles behind child protection at the community level and the interaction between these principles and rights talk within the plural legal context is one of the issues that this study set out to explore. The thesis revealed that the language of care, compassion and empathy that is dominant at the Kipsigis community level, augments that of rights at the national and international level to further the interest of children.[677] Thus a total exclusion of rights may not be in the best interest of the child as rights act as a fall back for

[674] Merry (n 56) 103, 134
[675] Robert Mnookin's 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' 1975 (39) Law and Contemporary Problems 226, 260
[676]
[677] Alderson (n 164)

children when community child protection systems fail, such as in cases of FGM and child marriage. However, it was also found that the focus on ordinary virtues such as care must correspond to the focus on informal justice system because formal justice processes cannot enforce care that is founded on customary law.

This study contributes to existing scholarship on the role of care in guaranteeing children's and by extension human well-being and responds to the widely held criticisms of the ethics of care – that care and virtues cannot be enforced. This is not to suggest that care and virtues have an exclusive capacity to guarantee child well-being at the community level but to recognize that care, just like other social phenomenon is a double-edged sword that has its strengths and weaknesses and whose application can immensely contribute to child well-being. One of the weaknesses of care and virtue ethics in as far as children's well-being is concerned is that actions that hinder the well-being of children such as corporal punishment are so institutionalised into the cultural infrastructure of the Kipsigis that they are justified on the basis of care. This research has demonstrated that customary conceptions of care may sometimes be inconsistent with the best interest of the subject of care. The study therefore addresses the ongoing debates surrounding the relationship between rights and care and their interaction in relation to children's well-being.[678]

Integrating care into formal child protection discourse and programmes is however challenging because most child well-being programmes are either donor-funded, donor inspired or state-centered. Since donors, through their local NGO actors are primarily concerned with the questions of justice and rights, translating care into a coherent and enforceable policy approach remains a challenge. Part of the reason is that the periodic reports submitted by governments to the UN human rights agencies such as the Committee on the Rights of the Child and regional human rights actors such as the Committee on the Rights and Welfare of the Child require a conceptualization of the report in terms of the state's compliance with legal rights as contained in the respective human rights treaties and not with customary care obligations. Such an approach as Oomen argues, has resulted into a technocratic, de-contextualized and political approach to justice and human rights which in essence robes the process and outcome of its cultural and normative validity which, as seen among the Kipsigis, is anchored in informal justice systems and customary law. [679]

Informal justice systems among the Kipsigis see children, parents, families and communities as having a natural reciprocal caring obligation towards each other. Any denial of well-being is therefore seen as a dereliction of the duty of care rather than a violation of any concrete right as envisioned in the Children's Act, the Constitution and international human rights instruments. However, it appears that a fulfillment of care obligation under customary law would go a long way in realizing children's socio-economic rights. As Gould succinctly observes, 'if rights rest upon claims of recognizing the humanness of others, then care is intrinsic to the starting point for human rights'.[680]

[678] For such a discourse see Held (n 257)
[679] Oomen (n 627)
[680] Carol Gould, *Globalizing Democracy and Human Rights* (Cambridge University Press, 2004) 144

10.6 Intersectionality, child abuse and the conception of the 'self' under customary law

At the onset, this thesis sought to understand how customary law responds to and or perpetuates violations of child well-being. As noted in chapter seven, customary law is a double-edged sword with regards to child well-being. The treatment of children under customary law is highly gendered so that male children are seen to have more social advantage (and therefore face lesser levels of abuse) than the girls.

To understand the foundation of the unequal treatment of children under customary law, it is important to first start by examining how different players in the Kipsigis society construct the self as well as how they conceive 'their' society and their laws against other societies and other laws. This self versus other dichotomy confers rights and duties differently to different players based on how the self perceives them. Thus, although institutions that possess or enforce alternative legal realities such as the police and children officers may be considered as 'the other' and therefore subject to resentment, non-Kipsigis communities are subject to the same treatment in so far as their customary law with regard to the child abuse is concerned.[681] The otherness in the Kipsigis society thus regresses from non–Kipsigis communities and speakers, to Kipsigis women to children and finally to the girls. This 'otherness' of the girl child is then used to justify the maltreatment of female among the Kipsigis. Since customs are largely shaped by patriarchal forces as argued by Musembi, Chanock and Mbote among others, men generally perceive boys to be an extension of the self (call it younger or future self) and therefore entitled to a similar system of well-being while the girls suffer rightlessness since they are considered as an extension of the women (call it younger other –or future other).

In the Kipsigis conception of household property ownership, women (part of the other) and children are considered as lacking full ownership capacity. Their control is limited to food and kitchen items. Thus, anybody who wants to borrow certain household items like axes, farm tools and seats must wait for the man (the self) to give his consent. Women and girls (the other) generally have access to household items while boys (the self) originally have access (just like the women and girls) but gradually gain control based on their evolving capacity. Male children from adolescence onwards progressively break into the 'male ownership cycle' in which they increasingly control more and more household items. Accordingly, if one is borrowing an axe or seats, he can either get it from a man or an adolescent boy but not a girl or woman. It is within this cultural context that the young man failed to obtain seats for us.

The research has revealed the nuanced nature of and the way in which gender differences privilege one set of children over others among the Kipsigis and the complex interaction between women's lives and children. De Graeve, basing her argument on the feminist approaches of care and intersectionality, has argued that an exploration of children's specific positioning within intersections of different social markers and care relations as well as an analysis of the matrixes of domination, interlocking inequalities and ideological assumptions that children might experience can provide an important guideline for a critical analysis of

[681] The researcher however noted that this practice seems to be similar among the communities that neighbour the Kipsigis.

children's rights.[682] Such an objective is best achieved by tracing the overlap between the lives of children and women among rural communities such as the Kipsigis and the way in which children's experiences (especially the experiences of girls) feed into and reinforce the gender inequality experienced in adulthood.

This study observed the deeply rooted intersectional nature of childhood among the Kipsigis. Although as argued by Crenshaw, intersectionality presumes an interaction of several factors that converge to propagate discrimination on given subjects, this study found out that the roles and statuses conferred upon different sets of children based on their gender make them active players in their own intersectional challenges. In other words, children are not just objects of intersecting factors but play a role in creating those factors. The gender of the child influenced the challenges and abuses that the child is likely to experience among the Kipsigis. Gender-related assumptions and stereotypes around men and women feed into (and sometimes propagate) the abuse against the children of corresponding genders. Thus, over time, male children gain adult male privileges, shift from victims of oppression to a privileged group and increasingly become perpetrators of oppression against women and girls while the females increasingly lose their status and eventually become family excesses that must be married off for having children outside wedlock (or to generate resources for the family). These resources are sometimes meant to benefit the boys in the family. Any attempt to explain childhood among the Kipsigis without embracing intersectionality would, therefore, result in omissions and commissions that would unnecessarily marginalizes one gender within the ongoing discourse on child justice and protection. At the same time, it was observed that intersecting realities of the child, often interacts with economic factors such as poverty to alienate further the male or female child. The underlying assumptions of child poverty literature, which presumes a homogenous victimhood among male and female children is therefore challenged by this study. Even within the same gender, economic realities and social-cultural factors interact to privilege some girls and boys over other girls and boys respectively. Child rights movement must start to embrace these difference if it is to emancipate the most marginalised girls and boys. Embracing customary sensitive intersectional care ethics is, therefore, a first step in this direction.

Formal child protection agencies at both international and domestic level presume a homogenous child whose interests can be identified through a mono-axis approach. This mono-axial approach has had a negative impact on child protection because the challenges that children face are widely multidimensional and interconnected with those of their parents, communities and wider families so that isolating the children's issue, as presumed in international and domestic child law is both impossible and undesirable. Within this context, customary law is holistically considered to be inappropriate for children and state law is promoted but as observed in this thesis the intersecting challenges facing child well-being are sometimes so intertwined with customs that it would be impossible to unpack them without appealing to customs. Thus, customary law is a double-edged sword which although playing a large role in the prevalence of child abuse equally plays an important role in resolving them.

[682] De Graeve, Katrien, 'Children's Rights from a Gender Studies Perspective: Gender, Intersectionality and Ethics of Care', in Woute Vandenhole, Ellen Desmet, Didier Reynaert, Kathy Vlieghe & Sara Lembrechts (eds.) *Routledge International Handbook of Children's Rights Studies*, (Routledge 2015) 14

Because communities such as the Kipsigis assign the role of supervising and caring for children to the women on one hand but at the same time consider women as equal to children, the current policy approach that completely separates adults from children is inconsistent with local realities where the lives of children are completely intertwined with that of their parents, specifically, their mothers. For instance, during my fieldwork, I visited an informal dispute resolution session that was being conducted in an open field in Bomet. Because we had not informed the elders of our visit, there were no seats reserved for the chief or 'his guest'.[683] When I arrived with the chief, everybody was already seated.[684] One of the young men in the audience was sent to the nearest home to get seats but came back to report that he could not get the seats because ''there was nobody in that home except a woman and children.'' Although women, as parents, are presumed to be more privileged than children in a lot of literature, this ethnographic experience illustrates the danger in such assumptions. On one hand, women are collectively considered to lack agency (except through approval by their husbands), while on the other hand, women are recognised agents who can bring claims before the informal justice systems and participate in cultural activities such as the marriage of their daughters.

(Re) generation of customary law in the Kipsigis social space, economic and historical factors all interact to disproportionately inflict poverty on the girl child among the Kipsigis. Because poverty is invariably linked to vulnerability, such girls easily fall prey to the financial manipulation of the boy child resulting into teenage pregnancy that not only robs the girl of her childhood but catapults her into premature adulthood to which she is neither ready, nor able to conform. Since there are generally more obligations and less protections for adult women, the premature female adult raises her child under the same system that she existed in, resulting into a vicious cycle of girl's marginalization or what Camilla Ida calls intergenerational intersectional discrimination.[685]

10.7 **Summary and areas for further research**

This research is located at the nexus between human rights and legal pluralism. It has demonstrated that the implementation of human rights law as an instrument of well-being cannot be successful unless the community concerns and ideologies, emerging from their plural legal backgrounds are taken into consideration. Using intersectionality and care ethics, the study has shown how grassroots communities use non-rights based language to guarantee child well-being. The study has also demonstrated how informal justice systems, as a platform for dispute resolution at the community level, utilize customary law to protect child well-being as well as how the use of customary law sometimes produces outcomes that violate the same well-being. The research has also observed a tussle between communities and the state over who owns children. Within this context, customary law becomes subject of contest and children have to embrace multiple positionalities at home and at school to be able to navigate the conflicting obligations placed upon them by the different actors. This chapter has succinctly summarised these observations in a way that makes them clear to the reader. Although it has indicated the contestations involved in child protection at the community level especially in the

[683] The author
[684] Unless there is a chief such sessions are usually held while people are seated down on the grass.
[685] Ravnbøl,Camilla Ida (n 483)
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face of multiple players and legal systems, the research has raised areas for further research as follows.

The study observed that customary law includes and excludes members based on their compliance. In the face of legal pluralism, those who are excluded by customary law, often move to areas where customary law is weaker (and state law is stronger) such as in cities and towns and operate within and between the two levels based on their convenience. For instance, women sometimes run away from the rural villages into slums in towns and cities either to escape from taboos, bad omen and curses emanating from their violation of customary law or to run away from stigma that is associated with divorce, especially when such divorce took place when they already had several children. Such women were considered as fugitives from customary law by elders and communities and were thus seen as outcasts. Within this context, cities and towns became 'cities of refuge' for such women due to the non-enforcement of customary law. Because cities and towns have a mixture of people from different communities (and therefore different customary laws) there is generally no customary stigma against them. An examination of the dynamics involves in this cross-systemic movement across the plural space is therefore necessary. To what extent does the customary space offer protection against state law? And to what extent does state law offer protection against customary law especially within the context of 'cultural refugees' like the migrating women? Does this escape from customary law lead to forfeiture of customary entitlements such as land and what is its implication on the entire theoretical framework of legal pluralism?

In the face of resilience of customary law, the state in Africa is increasingly abandoning its coercive approach and embracing customary law institutions such as elders to discourage those elements of customary law that it considers inappropriate (and illegal) such as FGM. Within this context, customary law is increasingly being reformed in line with state and NGOs agenda. One area where this is most pronounced in alternative rite of passage (ART). In view of the increasing appropriation of customary law by the state, what is the future of customary law? What is the implication of this state-sponsored change vis a vis endogenous change that naturally occurs within customary law (and within law in general anyway). What implication does this exogenous change have on the role of elders?

Legal pluralism scholarship presumes the existence of different layers of laws complete with their enforcement mechanism. It also recognizes the attempt by each to set of laws to reshape the other. One area in which this is evident in the case of magistrates working at the community level. Due to their status as dispute resolvers, magistrates often find themselves at the boundary of the tension between the government's attempt to formalize informal justice systems and customary law (by for instance proclaiming jurisdiction over customary matters and using restated customary law) and the community's attempt to informalize the formal justice systems by escaping the complex judicial procedures and reaching out to the magistrates outside the court context. It was thus noted that magistrates deployed in rural Kenya often have to live far away from their working stations to avoid scenarios where community members directly report children's cases to them at home or in social gatherings. How do formal law agents like magistrates respond to these tussles in view of their professional obligations under state law on one hand and customary obligations as members of the community on the other? What is the implication of these tussles on their interpretation of law and legal pluralism in general?

The presumptions in international and national child law that children are objects of protection and care needs to be revisited especially in the urban setting. It has been observed in this study that among the Kipsigis, children are active players in the realization of their own rights, either

by trying to claim the rights (as indicated in school textbooks) or by actively performing responsibilities that are associated with well-being. Are these realities similar for urban children? To what extent do urban children use school textbooks as sources of rights and are the responses of parents and guardians in urban areas similar to those in rural areas? What implication does the repositioning of school textbooks as sources of rights have for the entire rights framework? How can the rights created by 'conveyor belts' like school textbooks be reconciled with conventional children rights in case of inconsistency such as in the Kenyan situation? What is the interaction between these rights and the domestic legal systems in view of its plural nature? Put differently, what happens when the rights transmitter creates a different set of rights from those envisioned in mother instruments such as conventions, Constitutions or statutes?

It is hoped therefore that my research will provide the basis for further studies relating to access to justice, legal pluralism and informal justice systems. In particular, that my gendered and intersectional approach to understanding of caring about and for children will contribute towards the development of child rights scholarship but also to a better future for children.

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Organization: J.K.Bosek And Company Advocates(Kenya) &Temple Garden Chambers (UK)

Period: November 2015 to November 2018

Position: Human Rights Researcher–Kipsigis and Talai Compensation Claim**.** Kericho County is pursuing compensation for Members of the Kipsigis and Talai communities who were victims of British colonial injustices such as land alienation, deportation, detention and compulsory eviction. My roles in this claim include interviewing survivors, carrying out a historical human rights system analysis, collecting archival material on the colonial administration in Kenya and the UK and working in partnership with other human rights agencies towards the realization of justice for the Talai and Kipsigis.

Kenyatta University

Period: 2014- 2015

Position: Part-time Lecturer-Department of Gender and Development Studies.

Areas of Teaching: Gender and Democracy, Governance and Human Rights (Including writing of modules for the Digital School)

Responsibilities: Teaching, administering, supervising and marking examinations and CATS.

Jomo Kenyatta University of Science and Technology

Period: 2014 -2015

Position: Part-time Lecturer-Department of Development Studies

Areas of Teaching: Human Development, Gender Studies, Public Management, Law and Development.

Responsibilities: Teaching, administering, supervising and marking examinations and CATS

Children Legal Action Network (CLAN)

Program Manager

Period: May 2014 to March 2016

Responsibilities: Overseeing documentation of cases of gender-based violence and violence against Children in Busia and Nairobi, developing response and mitigation strategies and coordinating the activities of community paralegals in the project areas. Additionally, I supervised the activities of CLAN lawyers to ensure that justice is done for abused women and children. I was also responsible for research, co-ordinated research titled 'Mandatory reporting of Child Neglect in Kenya' and developed a handbook for community paralegals.

Organization: Collaborative Centre for Gender and Development (CCGD)

Period: December 2013 to May 2014

Gender Program Officer. My responsibilities included gender mainstreaming in all CCGD projects, development of advocacy materials on gender violence, examining gender-related challenges and coming up with strategies to mitigate them, lobbying and advocacy and development of gender advocacy materials. I was also involved in research and acted as a data analyst in research on the prevalence, scope and dynamics of gender-based violence during transition periods in Kenya. This research report titled '***Reducing Vulnerability to Sexual Gender-Based Violence in Kenya***' has since been published and is available online on http://ccgdcentre.org/index.php/publications

Research Activities

Helpage International, University of Warwick and University of Nairobi

Period: January to July 2019

As a researcher, I was involved in the preparation of concept notes and discussion papers for the Regional Workshop on Gender and Ageing in the African Context as well as in logistical preparation and rapporteuring during the workshop.

University of West Scotland and Mount Kenya University Research Partnership

Period: January 2018 to December 2020

This research project titled 'Cultural Heritage for Inclusive Growth' is a British Council project in Columbia, Kenya and Vietnam which seeks to explore the use of cultural heritage for growth to benefit all levels of society. The project also examines how cultural heritage can be development, protected and utilized for national development. As part of the research team, my

work involves data collection, analysis, report preparation and offering training to Kenyans involved in cultural heritage on legal aspects of cultural heritage.

Professor Ann Stewart (University of Warwick Law Professor/Researcher)

Period: November 2016 to March 2017.

As Ann's research assistant in the LeverhulmeTrust-funded Research on ''Protection of Older Women in Kenya's Plural Legal Systems'', I was involved in coordinating interviews with magistrates, advocates, judges, community leaders and women who are involved in woman to woman marriages as well as in organizing the workshop and presenting discussion papers.

Organization: FEMNET (Consultant)

Project: Working with religious and cultural leaders to promote sexual and reproductive health and rights (SRH) for Women and Girls in Kenya''

Period: September 2017-January 2018

Roles: As a project evaluator, my roles involved examining the international and national human rights framework for women, examining the extent to which the project had complied to this framework, interviewing stakeholders, examining the achievements of projects objectives, mapping best practices and coming up with recommendations on the sustainability of project output.

Peer-Reviewed Articles

Ngira David Otieno, 'The implication of an African Conception of Human Rights on the Women Rights Movement: A bottom-up approach to Women's Human rights Protection' (Forthcoming in East African Law Journal 2019)

Ngira David and Maureen Okoth, 'Exploring the (un)suitability of Restorative Justice in Addressing Gender Based Violence (2019) 7 (1) Journal of Alternative Dispute Resolution 33

Ngira, David, Utilization of African Culture in the Implementation of the UN Convention on the Rights of the Child: A Case Study of Kenya (2018) 94 (3) International Social Science Review 1

Ngira, David, 'Re-examining Burial disputes in Kenya through the Lenses of Legal Pluralism' (2018) 8 (7) Onati Social Legal Series

Ngira, David, '(Re) configuring 'Alternative Dispute Resolution' as 'Appropriate Dispute Resolution': A Philosophical Reflection', 2018, 6 (2) Alternative Dispute Resolution Journal 193

Ngira, David, 'Taking Apology Seriously: (Re) Thinking the Place of Apology in Formal and Informal Dispute Resolution Processes' 2018, 6(3) Alternative Dispute Resolution Journal 2

Ngira, David, 'The Nexus Between Human Rights and Human Security: Some Wayside Remarks 2018 2 (2) Journal of Conflict Management and Sustainable Development.

Ngira, David (2017) (Re) Positioning Socio-Economic Rights as Real Rights: A Response to Sceptics, (2017) 2 MKU law Journal 94

Non-Peer Reviewed articles

Ngira, David and Okoth, Maureen, Conceptualizing Environmental Crimes as Crimes against Humanity: A Philosophical Justification (2015) available at http://ssrn.com/abstract=2674065

Ngira, David 'Accelerating the 'War' Against Corruption: A Sociological Perspective (2015) available at http://dx.doi.org/10.2139/ssrn.2671373

Ngira, David, 'Corruption and Human Rights: The Role of Judicial Activism in the 'Fight' Against Corruption' (2015) available at SSRN: http://dx.doi.org/10.2139/ssrn.2670770

Ngira David and Mogeni Shilako 'Burden Sharing as an Effective Mechanism of Handling the Refugee Crisis'(2016) available at http://ssrn.com/abstract=2743177

Conferences attended

Informal Justice Systems and the Protection of the Best Interest of the Child among the Kipsigis of Kenya (Paper presented during the annual Socio-legal Studies Association Conference at the University of Leeds from 3rd to 5th April 2019)

Protection of older persons under Customary Law. (Paper presented during the Regional Workshop on Gender and Ageing in the African Context organized jointly by the University of Warwick, University of Nairobi and Helpage International at Westwood Hotel from 4th to 6th June 2019)

A human Rights dimension of Informal Justice systems in Kenya: Exploring overlapping realities between formal and informal justice in child protection (Paper presented during the 3rd Conference of the Law and Development Research Network at the University of Leiden, the Netherlands from 19th-23rd September 2018)

Children's Rights in Kenyan customary justice systems (Paper presented during the conference on human rights and cultural diversity at UCR-28 11 2018)

http://cchr.uu.nl/seminar-on-human-rights-and-cultural-diversity/

The legal foundation of woman to woman marriages under customary and state law' (Paper presented during the Care, Work and Property workshop sponsored by the University of Warwick and held at British Institute in East Africa (BIEA) Nairobi, Kenya, Sept 2017)

Children Rights under informal justice systems in Kenya. (Paper presented during the Biennial Conference of the Commission for Legal Pluralism at the University of Ottawa, Canada, August 2018)

REFEREES

1. Seth Ojienda- HOD, Mount Kenya University Parklands Law Campus: hagenoluoch@mku.ac.ke
2. Prof Barbara Oomen – Utrecht University/University College Roosevelt B.Oomen@ucr.nl
3. Prof Ann Stewart- University of Warwick - A.Stewart@warwick.ac.uk
4. Kennedy Otina
   Programme Officer- FEMNET
   mentomen@femnet.or.ke